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No. 588

ILLINOIS CENTRAL RAILROAD COMPANY, [illegible]
MOBILE AND OHIO RAILROAD COMPANY, [illegible]
SISSIPPI EXPORT RAILROAD COMPANY, [illegible]

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, [illegible]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.

ILLINOIS CENTRAL RAILROAD COMPANY, GULF, MOBILE AND OHIO RAILROAD COMPANY, MISSISSIPPI EXPORT RAILROAD COMPANY, ET AL.,
Appellants,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this Court, Illinois Central Railroad Company, *et al.*, appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered on October 12, 1954.

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (together with the dissenting opinion of

District Judge Thomas) is reported at 124 F. Supp. 809. The report of the Interstate Commerce Commission is found at 291 I. C. C. 39. The opinion of the District Court and the dissenting opinion of Judge Thomas are attached hereto as Appendix A. The final judgment of the District Court is attached hereto as Appendix B.

BASIS OF JURISDICTION.

I.

This is an action brought by the Mississippi Public Service Commission, in which certain shippers intervened as plaintiffs, to annul, set aside, and enjoin an order of the Interstate Commerce Commission entered under section 13(4) of the Interstate Commerce Act, 49 U. S. C. § 13(4), fixing intrastate rates for the transportation within Mississippi of certain commodities after a finding that the rates made or imposed on such commodities by authority of the State of Mississippi caused and for the future would cause undue, unreasonable, and unjust discrimination against interstate commerce.

II.

The final judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, was entered on October 12, 1954. Notice of appeal was filed in said Court on December 9, 1954. By order entered February 1, 1955, the time for docketing this appeal was extended to February 28, 1955.

III.

The jurisdiction of this Court to review on appeal the final judgment of the District Court is conferred by 28 U. S. C. § 1253, 62 Stat. 928.

IV.

Cases which sustain the jurisdiction of this Court to review on appeal the final judgment of the District Court are *King* v. *United States* (1952), 344 U. S. 254; *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.* (1922), 257 U. S. 563; *Northern Pacific Railway Co.* v. *Montana* (1952), 344 U. S. 905.

V.

The principal provisions of the Interstate Commerce Act which are involved in this proceeding are as follows:

Sec. 13(4) [41 Stat. 484; 49 U. S. C. § 13(4)]:

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Sec. 15a(2) [54 Stat. 912; 49 U. S. C. § 15a(2)]:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due

consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

QUESTION PRESENTED.

The question presented by this appeal is whether, in setting aside and permanently enjoining the order of the Interstate Commerce Commission prescribing, under section 13(4) of the Interstate Commerce Act, certain intrastate freight rates in Mississippi on the ground that such order was not supported by substantial evidence, the District Court misapprehended or grossly misapplied the standard for determining the substantiality of evidence approved by this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474.

STATEMENT OF THE CASE.

This is an appeal from a final judgment of a specially constituted United States District Court of three judges which, with one judge dissenting, set aside and enjoined an order of the Interstate Commerce Commission prescribing under section 13(4) of the Interstate Commerce Act, 49 U. S. C. § 13(4), intrastate rates for the transportation within Mississippi of cottonseed and products thereof, soybeans and products thereof, fertilizer and fertilizer materials, lumber and articles taking the lumber rates, pulpwood, sand and gravel, and brick and related articles in the brick list,* herein referred to as the excepted commodi-

* Cement and refined petroleum in tank cars were originally included in the order but were later eliminated from the order and are no longer involved in the case.

ties. The Commission found that the intrastate rates required to be maintained on such commodities by authority of the State of Mississippi resulted and for the future would result in undue, unreasonable, and unjust discrimination against interstate commerce in violation of section 13(4) of the Interstate Commerce Act and ordered such discrimination removed by applying to the Mississippi intrastate rates and charges on the excepted commodities the same respective increases as were authorized in *Increased Freight Rates, 1951,* 284 I. C. C. 589, to be maintained on like interstate traffic between points in Mississippi and adjoining States.

In *Increased Freight Rates, 1951,* 284 I. C. C. 589, commonly referred to by the docket number of the proceeding, *Ex Parte* No. 175, the Commission authorized the rail carriers to increase by 15 percent their interstate freight rates and charges subject to certain exceptions and maximum increases.*

Similar increases were sought in Mississippi intrastate freight rates and charges by the carriers operating in Mississippi. After lengthy proceedings, the Mississippi Commission granted a general increase in rates to correspond to that granted by the Interstate Commerce Commission but it made certain exceptions with respect to the commodities which are involved in this proceeding. No increase was permitted by the Mississippi Commission on sand and gravel or brick and related articles. On the remaining commodities, an increase of 6 percent was permitted. The excepted commodities are very important

* The increase authorized in *Ex Parte* No. 175 for application to the interstate rates on the excepted commodities was 15 percent except that on sand and gravel the authorized increase was 12 percent and on lumber and related articles the authorized increase was 15 percent with a maximum increase of 12 cents per 100 pounds.

and produce the major portion of appellants' intrastate freight revenue in Mississippi.

In response to a petition of the rail carriers operating in Mississippi, the Interstate Commerce Commission instituted under section 13(3) of the Act an investigation into the lawfulness of the Mississippi intrastate freight rates and charges on the excepted commodities. After a hearing, briefs, proposed report, exceptions, and oral argument, the Interstate Commerce Commission found that the rates which the State of Mississippi compelled the carriers to maintain caused and for the future would cause undue, unreasonable, and unjust discrimination against interstate commerce and ordered such discrimination removed by applying to the Mississippi intrastate freight rates and charges the same increases as were authorized on like interstate traffic by the Interstate Commerce Commission in *Ex Parte No.* 175. *Mississippi Intrastate Freight Rates and Charges,* 291 I. C. C. 39.

The Mississippi Commission, on March 11, 1954, filed its complaint in the District Court to set aside and enjoin the order of the Interstate Commerce Commission. Several shippers intervened as plaintiffs in the action. These appellants, rail carriers operating in Mississippi, intervened as defendants. On March 17, 1954, after a hearing, the United States District Judge to whom the case was assigned denied the applications of the plaintiff and intervening plaintiffs for a temporary restraining order, and on March 19, 1954, the rates ordered by the Interstate Commerce Commission became effective.

On May 31, 1954, a hearing was held before the three-judge court on the applications of plaintiff and intervening plaintiffs for a temporary and a permanent injunction. At the close of the hearing, the Court in open court denied the applications for a temporary injunction. On the following day, however, the parties were informed by tele-

phone that the Court would grant a temporary injunction. Such an injunction was granted effective June 15, 1954, with one judge dissenting, and the rates which had been allowed to become effective on March 19, 1954, were cancelled.

On October 12, 1954, the Court, with one judge dissenting, entered a final judgment annulling and setting aside the order of the Interstate Commerce Commission and permanently enjoining its enforcement. Notice of appeal was filed December 9, 1954. By order entered February 1, 1955, the time for docketing this appeal was extended to February 28, 1955.

THE QUESTION PRESENTED IS SUBSTANTIAL.

In this case appellants are asking this Court to condemn a philosophy of judicial review based upon the application of a technique and a standard which are completely at variance with those previously established by this Court. The standard applied by the District Court in this case for determining the substantiality of the evidence, far from being sanctioned by *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, is indeed based upon a misapprehension and gross misapplication of the standard approved by this Court in that case.

Merely stating briefly some of the more important errors made by the District Court shows how far the District Court strayed from the standards which this Court has set up for reviewing orders of the Commission prescribing intrastate rates under section 13(4) of the Act.

a.

The District Court relied on the fact that there "was no separation made by the railroads of their revenues, expenses and properties as between interstate and intra-

state operations" (124 F. Supp. at 815) although it is well known that such a separation between interstate and intrastate operations is impracticable and the Commission, an expert body having knowledge of such matters, has so held on numerous occasions. *Wyoming Intrastate Freight Rates and Charges* (1953), 287 I. C. C. 743, 755. This Court has also held that no such separation is required, *Illinois Commerce Comm.* v. *United States* (1934), 292 U. S. 474, 483-4, and has held that the power of the Commission to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return "on the value of property devoted to the transportation service, both interstate and intrastate." *United States* v. *Louisiana* (1933), 290 U. S. 70, 75; *North Carolina* v. *United States* (1945), 325 U. S. 507, 520.

b.

The District Court held that "In order to authorize the Commission to exercise the power to nullify intrastate rates under section 13(4) of the Act, it must be shown * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *" (124 F. Supp. at 813) although the findings of the Commission establish beyond question that the basis of the order is "undue, unreasonable, and unjust discrimination against interstate commerce" (291 I. C. C. at 64) and not undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. This distinction was clearly pointed out by this Court in *Florida* v. *United States* (1931), 282 U. S. 194, 214. See also *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. Co.* (1922), 257 U. S. 563, 586-7.

c.

The District Court held that "The findings of a state commission which is familiar with * * * conditions in the state * * * when its opinion differs from the Interstate Commerce Commission's findings detracts [*sic*] heavily against the findings of the Interstate Commerce Commission * * *" (124 F. Supp. at 815) although there is no legal basis for giving any weight whatsoever to the findings of the Mississippi Commission made in another proceeding, under a State statute involving dissimilar issues, upon evidence which is not a part of this record.

d.

The District Court held that "There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient" (124 F. Supp. at 815) although this Court, in *King* v. *United States* (1952), 344 U. S. 254, 271-2, held that substantially the same findings as were made here, and upon substantially the same type of evidence, "go far beyond the bare disparity between the existing intrastate rate and the proposed minimum rate which is in substantial uniformity with the interstate rate."

e.

The District Court was erroneously influenced by the fact that the testimony before the Interstate Commerce Commission was "taken before an examiner" (124 F. Supp. at 816) while, in the proceeding before it, the Mississippi Commission heard the testimony "itself and not through an examiner" (124 F. Supp. at 814). Furthermore, the Court's finding that the Mississippi Commission

was "as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission" (124 F. Supp. at 816) is utterly without foundation.

f.

The District Court repeatedly referred to the fact that it was called upon to "weigh" the testimony before the Commission, particularly with respect to the effect of competition upon the reasonableness of rates and with respect to the revenue effect of the increased rates, both of which matters are outside the competence of the District Court.

g.

The District Court held that "The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole," (124 F. Supp. at 817) although the discussion in the Commission's report, 291 I. C. C. at 63, shows that the Commission did not disregard such evidence. The Commission's finding that there is no indication that passenger-train eliminations have effected greater economies in Mississippi than on other parts of the appellants' systems and the finding that there is no sound basis for the contention that rate variations are justified because of variations in passenger revenue are clearly supported both by the law and by the evidence.

Numerous other errors were committed by the District Court, but those pointed out above are sufficient to indicate how radically the District Court departed from the standards which up to now have always governed the review of Interstate Commerce Commission orders in the courts. The District Court purports to justify such de-

partures on the basis of the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474. Whether the previously accepted standards of judicial review of such orders have been so materially altered by *Universal Camera* presents a substantial question for the consideration of this Court.

Because of their greatly increased costs of operation in the post-war period, the railroads of the country have been granted several general increases in rates to carry out the intent of the National Transportation Policy, 54 Stat. 899, 49 U. S. C., preceding § 1. Such increased operating costs are incurred on intrastate as well as interstate traffic. Most States have permitted increases in intrastate rates similar to those in interstate rates. Where some of the States have not done so, as here, there have often been proceedings under section 13(4) of the Act to remove the unjust discrimination against interstate commerce caused by the failure of intrastate traffic to bear its fair share of the transportation burden.

Such orders as have been, or may be, entered by the Commission under section 13(4) of the Act ought to be judged by the same standards no matter in what court they may be reviewed. To leave the determination of such matters to the arbitrary judgment of individual courts is unfair to the Commission, the rail carriers, the shippers, and the State authorities and is a result which was obviously not intended by *Universal Camera.*

What can happen when different courts do not apply substantially similar standards for determining the substantiality of evidence is illustrated by a case recently decided per curiam by this Court, *Louisiana Public Service Commission* v. *United States,* No. 351, October Term 1954, decided November 22, 1954, in which this Court upheld the validity of an order of the Interstate Commerce Commission prescribing under section 13(4) of the Act

intrastate rates on certain commodities moving within the State of Louisiana. The Louisiana and Mississippi cases were tried before the Commission in the same month. To be sure, no two cases are exactly alike, but these cases involved the same issues and the evidence presented in both of them was substantially similar. In both cases the Commission's findings were substantially the same, but the Louisiana order was upheld by a District Court and the Mississippi order was set aside by a different District Court in a split decision. The incongruity of this situation was pointed out by the appellants in the Louisiana case in their reply to the motions to affirm and their petition for rehearing.

One illustration should suffice at this point to show how far the Mississippi District Court has departed from the previously accepted standards of judicial review. In discussing appellants' testimony with respect to the revenue effect of the increases sought, the District Court said:

> "The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked, but their testimony has been fully weighed in the light of the entire record and proceedings in this case and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission." 124 F. Supp. at 816.

For the District Court to find that "the testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests" did not amount to substantial evidence is a contradiction in terms, and the only way the Court could make such a finding was to substitute its judgment as to the weight of the evidence for that of the Commission.

Predictions of "experienced railroad traffic men" as to the revenue effect of increased rates have been approved by this Court. *United States* v. *Louisiana* (1933), 290 U. S. 70, 80. See, also, *Florida* v. *United States* (1934), 292 U. S. 1, 9. The District Court recognizes that there was in the record the "testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests." There was also in the record here, as there was in the Louisiana case and in almost every case under section 13(4) of the Act, considerable testimony of shippers who testified that the carriers would not gain additional revenue from the rate increases. But the power to decide "between two fairly conflicting views" of the evidence, even under *Universal Camera,* belongs to the Commission and not to the District Court "even though the court would justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S. at 488.

The repeated references of the District Court to the effect that it must "weigh" the testimony cannot be ascribed merely to an unfortunate choice of language, but clearly indicate the application of an erroneous standard of judicial review and one which is in no way sanctioned by *Universal Camera.*

It is recognized that there must of necessity be some margin for individual judgment, but this Court made it clear in *Universal Camera* that

> "* * * a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in." 340 U. S. at 489.

How the judicial judgment could be any more at large than it was in the District Court in this case would be difficult to imagine and the construction of a few fences is clearly called for.

CONCLUSION.

Whether all previous standards of judicial review of orders of the Interstate Commerce Commission under section 13(4) of the Act from *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.* (1922), 257 U. S. 563, to *King* v. *United States* (1952), 344 U. S. 254, are now to be disregarded upon the authority of *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, presents a substantial question for the consideration of this Court and one of importance to the Commission, the railroads, and the shippers.

Respectfully submitted,

HAROLD E. SPENCER,
135 East Eleventh Place,
Chicago 5, Illinois,
A. J. BAUMANN,
ROBERT BURNS,
J. L. BYRD,
A. J. DIXON,
Y. D. LOTT, JR.,
PRIME F. OSBORN,
Counsel for Appellants.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
For the Southern District of Mississippi.
Jackson Division.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *Plaintiff,* *vs.* THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 2120.

OPINION.

MIZE, *J.*

This is an action seeking to annul, set aside, and permanently enjoin enforcement of an order of the Interstate Commerce Commission entered February 1, 1954, in accordance with the report findings and conclusions entered November 2, 1953, in the proceeding No. 31164, *Mississippi Intrastate Freight Rates and Charges,* under which the respondent rail carriers operating in Mississippi were required to establish intrastate freight rates and charges in Mississippi no lower than the rates and charges prescribed and provided for in said report. The action was filed by the Mississippi Public Service Commission against the United States and the Commission, and served upon the Commission March 15, 1954. Answers have been filed by the United States, by the Commission, and railroad respondents operating in Mississippi. Certain shippers and

associations, as named in the several motions, have intervened in support of the Mississippi Commission. The case was heard on its merits and upon an application for a temporary injunction by consent at the same time. The temporary injunction was granted pending a final judgment.

The Commission proceedings were instituted October 17, 1952, upon the filing of a petition by seventeen railroads, with a supplemental petition filed November 21, 1952, seeking an order, after investigation, to authorize increase of intrastate freight rates in Mississippi, to the same extent and in the same manner as authorized by the Commission in respect to interstate rates and charges, in *Ex Parte* No. 175, *Increased Freight Rates,* 1951, 284 I. C. C. 589, hereinafter referred to as X-175. The railroads had, prior to filing petitions with the Commission, filed petitions with the Mississippi Commission, seeking approval of the increased rates, which were denied by order of that Commission, entered November 8, 1952. By order of December 5, 1952, Division 1 of the Commission ordered such investigation and a hearing before an examiner for February 2, 1953, at Jackson, Mississippi.

After the hearing a report by Examiner Vandiver was filed and served on May 27, 1953. The proposed report found that the intrastate rates imposed by the Mississippi Commission on cottonseed and products thereof, soy beans and products thereof, fertilizer and fertilizer materials, lumber and articles listed as taking the lumber rates, pulpwood, sand and gravel, cement, brick and related articles in the brick list, and refined petroleum in tank cars, were abnormally low, and traffic thereunder fails to produce its fair share of revenue to enable railroad respondents to provide adequate and efficient service, and such rates cause undue, unreasonable, and unjust discrimination against interstate commerce. The Mississippi Commis-

sion and three protestants filed exceptions to said report, and respondent railroads filed reply thereto.

The Commission entered its report on November 2, 1953, 291 I. C. C. 39. Ultimate findings of the Commission are set forth in the report and are substantially the same as those proposed by the Examiner. The report provided that an order would be issued making the findings effective, unless notified within 30 days after service, by the Mississippi Commission, that it would promptly permit the approved increases. Upon petitions of the Mississippi Commission, the Commission, by orders dated November 25 and December 23, 1953, extended the date on which such notification should be given to February 1, 1954. The Mississippi Commission and three protestants filed petitions for reconsideration of the report of November 2, 1953, which were denied by the Commission order of February 1, 1954, under which respondent railroads were ordered to establish the intrastate rates prescribed for the commodities named in the report, on March 19, 1954, effective upon five days' notice. Petition of the Mississippi Commission was filed March 9, 1954, to amend the order of February 1, 1954, so as to remove therefrom the requirement to increase intrastate rates on refined petroleum in tank cars. By Commission order of March 10, 1954, the order of February 1, 1954, was so amended.

The Commission authorized, in X-175, a general increase of fifteen per cent on basic interstate freight rates and charges, subject to certain exceptions and modified increases, which was the fourth general increase since World War II. The railroads operating in Mississippi filed petition with the State Commission, seeking the same increases on intrastate rates and charges as authorized on interstate rates under X-175.

The Mississippi Commission had a full hearing and

authorized an increase in intrastate rates and charges of the full fifteen per cent on all less than carload freight and upon all carload freight, except as to carload line haul rates of brick and related articles upon which the Mississippi Commission granted no increase, cement, upon which the Mississippi Commission granted no increase, fertilizer and fertilizer materials, upon which the Mississippi Commission authorized a six per cent increase, lumber, upon which the Mississippi Commission authorized a six per cent increase, pulpwood, upon which the Mississippi Commission authorized a six per cent increase, sand and gravel, upon which the Mississippi Commission granted no increase, cottonseed and products thereof, upon which the Mississippi Commission authorized a six per cent increase, soya beans and the products thereof, upon which the Mississippi Commission authorized a six per cent increase, cattle feed made 65% or more of cotton seed or soya bean products, upon which the Mississippi Commission authorized a six per cent increase, and refined petroleum in tank cars, upon which the Mississippi Commission authorized an increase of six per cent. Upon all of the commodities excepted the increase authorized by the Interstate Commerce Commission was fifteen per cent with the single exception of sand and gravel upon which the interstate increase was twelve per cent.

Cattlefeed made 65% or more of cottonseed or soya bean products is not involved in this case as same was excepted from the report and order of the Interstate Commerce Commission. Refined petroleum in tank cars is likewise not involved in this proceedings for the reason that, by order dated February 23, 1954, the Mississippi Commission ordered that the intrastate rates for that commodity be increased the full fifteen per cent authorized in *Ex Parte* No. 175. All of the remaining excepted commodities are in issue, there being involved the differ-

ential in the increases authorized by the Mississippi Commission and the Interstate Commerce Commission as outlined above.

The Commission report, finding 3, prescribed the interstate increase on all the commodities excepted by the Mississippi Commission. The rates involved herein relate only to said excepted commodities as an issue, of which refined petroleum in tank cars was removed by the Commission order of March 10, 1954, entered after the Mississippi Commission had approved the interstate increase for that commodity.

The ultimate issue relates to the validity of the orders of the Commission requiring the rail carriers to increase their Mississippi *intrastate* rates and charges to the same level prescribed in the report of November 2, 1953. Section 13(4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce. Paragraphs XII and XIII of the complaint allege illegality of the final report and order of the Commission, on grounds there stated of violation of constitutional rights; action beyond the scope of statutory authority; unsupported by substantial evidence or contrary to evidence; and arbitrary action.

The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law in recent years has been fully announced and declared by the Supreme Court.

The Interstate Commerce Commission has no general authority to regulate intrastate rates. The mere existence of a disparity between interstate and intrastate

rates does not authorize the Commission to enter a field properly consigned and belonging to the state regulatory body and interfere with rates established by state authority. Section 13(4) of the Interstate Commerce Act does not automatically require complete uniformity in intrastate and interstate rates but the state commission may fix a lower intrastate rate than the interstate rate, unless an undue advantage to intrastate traffic and an unfair discrimination against interstate traffic results therefrom. This rule was properly and clearly declared by the Supreme Court of the United States in the case of *North Carolina* v. *United States,* 65 S. Ct. 1260, 325 U. S. 507, 89 L. Ed. 1760.

The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.

In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13(4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates. *North Carolina* v. *United States, supra.* The Court further held in that case that the power of the Commission to require

states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operation costs and to yield a fair return on the value of the property directed to the transportation service both interstate and intrastate. Moreover, it reaffirmed the doctrine that the Commission could not require intrastate rates to be raised above a reasonable level.

The Interstate Commerce Commission is granted wide powers to prescribe rates on interstate freight as well as other transportation matters. That function belongs primarily and exclusively within the limits of the Act to the Commission; however, its authority over intrastate rates is limited as above set out and Section 13(4) of the Act was never intended to deprive the state commission of their primary authority to regulate intrastate rates. There is a point where the power of the state commission ceases and the power of the Interstate Commerce Commission begins, but as stated by Mr. Justice Black in the *North Carolina* case, it is not always easy to designate that point.

Other principles of law have been clearly declared by the Supreme Court of the United States. Intrastate traffic must bear a fair proportionate share of the costs of maintaining an adequate railway system. *Wisconsin Railroad Commission* v. *Chicago B. & Q. Railway,* 257 U. S. 563. It is within the power of the Interstate Commerce Commissior to determine if the intrastate rates do that; however, before it can alter intrastate rates the justification therefor must clearly appear and be supported by substantial evidence. It is not sufficient that there be simply a difference between interstate rates fixed by the Commission and the intrastate rates as fixed by the state commission. The fixing of intrastate rates is primarily the duty of the state commission and the record in this case

demonstrates that the Mississippi Commission gave great study and investigation and heard much testimony before the commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commission, then its power and its conclusions override that of the state commission, but a mere disparity of itself in the rates fixed by each commission is not sufficient. *Florida* v. *United States,* 282 U. S. 194. Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts, but if such findings are not supported by substantial evidence, then the matter is one for the court to determine and such order cannot be upheld. In determining in the first instance whether intrastate rates should be raised or lowered the Interstate Commerce Commission is allowed wide latitude in directing that intrastate rates be increased and may take into consideration material and reports which were before the Commission in previewing a nationwide increase in interstate freight rates. The Commission's jurisdiction over intrastate rates is not limited to cases where those rates are confiscatory. *King, et al.* v. *United States, et al.,* 344 U. S. 254.

The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Su-

preme Court of the United States in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474 held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission.

Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that frequently appears in the construction of many laws. There are many instances in which judgments are required to be supported by substantial evidence. The verdicts of juries in some states are required to be supported by substantial evidence and it then becomes a question for determination by the court as to whether or not a verdict is supported by substantial evidence and if it is not, then the court reverses and directs that judgment be entered when not supported by substantial evidence. The decisions on this matter are numerous. See Words and Phrases, Permanent Edition, Vol. 40, 1954 Annual Pocket Part, P. 88. Substantial evidence is a term that cannot be defined definitely, but whether the evidence in a particular case amounts to substantiality must be determined from the facts of each case as it arises.

The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and

to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order. The record shows that in making the investigation for the nation as a whole in *Ex Parte* No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers. The record of the evidence in the case reflects a favorable financial condition of the railroads involved herein when contrasted with that of the railroads of the country as a group. The statistics introduced in evidence and reflected by the various reports show that the national average of returns for the railroads was 4.02 per cent; whereas, the condition of the railroads involved in this controversy was in a better financial situation and their earnings greater than the 4.02 per cent. The Interstate Commerce Commission in *Ex Parte* No. 175, when granting freight rate increases took into consideration the losses sustained by the railroads in passenger operations. This was correct and was upheld in *King* v. *United States,* 344 U. S.

254, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi. There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient. Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. The record shows in this case that the need of the carriers involved here for additional revenue is not as great as the needs of the railroads of the country as a whole. The statistics introduced in evidence and now in the record demonstrate this.

The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are concerned in Mississippi. When the intrastate freight rate level on a given commodity is at such level that any increase in the rate would have the effect of diverting traffic from the rail carriers to competing forms of transportation, then it would follow that the revenue derived would be diminished rather than in-

creased. In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission* v. *Great Western Railway Company*, 141 Fed. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors. The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.

The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000.00 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. The testimony upon this proposition is exceedingly weak. It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased. The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testi-

mony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved. The record is clear in this case that the revenue needs of the railroads of the Eastern District and in the South or Western District and the financial condition of the petitioning railroads involved in this case are in better condition than the national average.

On the trial before this Court there was introduced in evidence Plaintiff's Exhibit 4, which was a petition by the railroads made to the Interstate Commerce Commission seeking a modification of the Commission's order so as to authorize lower rates upon sand and gravel and Plaintiff's Exhibit 5, being an order thereon granting the prayer of the petition. There was no objection to the introduction of these documents but even if they should have been irrelevant as having occurred since the filing of the suit, it still would be true that there was not sufficient substantial evidence to support the order but if these documents be considered, they simply demonstrate that the higher rate given the railroads would cause the traffic to divert to competitors. The commodities involved in this controversy require shorter hauls than do the interstate shipments and are therefore more susceptible to competition. On all of the commodities involved in the controversy the competition by carriers is keen and would come not only from regulated trucks for hire but from unregulated trucks and

from trucks owned and operated by the shippers themselves. This is clearly shown by the record by positive testimony and overwhelmingly overthrows and overrides the opinions of the experts.

The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than passenger deficits of the same railroads for their systemwide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Commission to give proper consideration to this testimony. *King* v. *United States, supra.*

At the time the original complaint herein was filed and at the time of the hearing and when the case was submitted to the Court for judgment, cement in carload lots was one of the commodities involved and an intervention by the Marquette Cement Manufacturing Company was allowed but since that date the Marquette Cement Manufacturing Company, one of the intervening plaintiffs, moved to be permitted to withdraw its intervention for the reasons stated in the motion and likewise the plaintiff moved to amend its complaint so as to eliminate cement from the commodities at issue and without objection an order was entered on the 13th day of September, 1954, sustaining each of said motions. The complaint was amended so as to eliminate cement and the petition of the Marquette Ce-

ment Company was dismissed for the reasons stated in said motions, there being no objections from any one of these motions.

For the reasons herein stated the order of the Interstate Commerce Commission will be set aside and its enforcement enjoined.

Order may be drawn in accord herewith.

Jackson, Mississippi, September 21, 1954.

/s/ E. R. Holmes,
United States Circuit Judge,

/s/ S. C. Mize,
United States District Judge.

In the United States District Court
For the Southern District of Mississippi,
Jackson Division.

Mississippi Public Service Commission, *Plaintiff,* *vs.* The United States of America and The Interstate Commerce Commission, *Defendants.*	Civil Action No. 2120

OPINION.

Thomas, *District Judge,* dissenting:

As stated by Judge Mize in the majority opinion, the paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law is well settled "that an order of the Commission is entitled to finality, and may not be set

aside, modified, or disturbed on judicial review, if such order of the Commission lies within the scope of the Interstate Commerce Statute, and is based upon adequate findings that are supported by substantial evidence.'"[1] There is no question but that the order of the Commission lies within the scope of the statute. In discussing the limitation upon the right of courts to review orders of the Commission, in the case of *Interstate Commerce Commission* v. *Union Pacific Railroad Company,* 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, the court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.,* 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In my opinion, the findings made by the Commission in support of its conclusion are entirely adequate, and fulfill the needs emphasized in the case of *North Carolina, et al.* v. *United States, et al.,* 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260.

The record must be considered as a whole. I have considered the record as a whole and am of the opinion that

1. *Louisiana Public Service Commission* v. *United States of America and the Interstate Commerce Commission,* U. S. District Court, Eastern District of Louisiana, decided July 9, 1954.

on the authority of *King, et al.* v. *United States, et al.*, 344 U. S. 254, 97 L. Ed. 301, 73 S. Ct. 259, the order complained of has a rational basis in adequate findings, which are supported by substantial evidence.

I respectfully dissent from the majority opinion.

/s/ DANIEL H. THOMAS.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Mississippi,
Jackson Division.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *Plaintiff*, *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 2120

FINAL JUDGMENT.

This cause came on for hearing before the statutory three-judge court duly convened by the Chief Justice of the Circuit pursuant to Sections 2284 and 2325 of Title 28 of the United States Code by designating as additional judges the Honorable E. R. Holmes, Justice of the Court of Appeals for the Fifth Circuit, and the Honorable Daniel H. Thomas, Judge of the United States District Court for the Southern District of Alabama, upon final hearing upon the complaint of the Mississippi Public

Service Commission, plaintiff in the above entitled cause, praying for a final decree that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, and each of them, are unlawful, null and void, and that the enforcement of said report and order be permanently enjoined, restrained, annulled and set aside, and that the Interstate Commerce Commission be directed to enter an order dismissing the proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, in which said report and order were entered.

It appearing that the above entitled cause was duly set down for final hearing at Jackson, Mississippi, on the 31st day of May, 1954, and that proper notice of said hearing was given to the plaintiff, the defendants and to all intervenors herein, and that all parties were present in person or by counsel; and, upon consideration of the plaintiff's verified complaint and the answers thereto, and upon consideration of the record of the proceedings before the Interstate Commerce Commission in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, and upon consideration of all other evidence introduced at the hearing, and the arguments and briefs of counsel, the Court is of the opinion and finds that the plaintiff, Mississippi Public Service Commission, is entitled to a permanent injunction and to the relief prayed for in its complaint for the reasons more fully set forth in majority opinion heretofore filed in this cause.

It is, therefore, ordered, adjudged and decreed by said statutory three-judge court that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, both having been entered in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C.

Docket No. 31164, and each of them, are unlawful, null and void, and are hereby set aside and annulled, and that the enforcement thereof be, and it is hereby, permanently enjoined.

It appearing to the Court that the parties intervening on the side of the defendants in this action are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

So ordered, adjudged and decreed this the 12th day of October, 1954.

/s/ E. R. Holmes,
E. R. Holmes,
Judge of the Court of Appeals for the Fifth Circuit.

/s/ S. C. Mize,
S. C. Mize,
Judge of the United States District Court for the Southern District of Mississippi.

I dissent from the foregoing for the reasons set forth in my dissenting opinion heretofore filed in this cause.

/s/ Daniel H. Thomas,
Daniel H. Thomas,
Judge of the United States District Court for the Southern District of Alabama.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

STATEMENT AS TO JURISDICTION

In compliance with Rule 13 of the Rules of the Supreme Court of the United States, as revised, the Interstate Commerce Commission submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the district court entered in this cause on October 12, 1954. Notice of appeal was filed in the district court December 9, 1954.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Mississippi is reported at 124 F. Supp. 809, and a copy is appended hereto (Appendix A). A copy of the final judgment of the district court is also appended (Appendix B). The

report of the Interstate Commerce Commission appears at 291 I. C. C. 39.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision in this case is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal: *New York* v. *United States,* 257 U. S. 591; *United States* v. *Louisiana,* 290 U. S. 70; *Montana* v. *United States,* 290 U. S. 593; *King* v. *United States,* 344 U. S. 254.

QUESTIONS PRESENTED

Since 1946 the Interstate Commerce Commission, hereinafter called the Commission, has authorized four general percentage increases in interstate railroad freight rates. The last of these, hereinafter referred to as Ex Parte 175,[1] authorized the railroads to increase, among others, their interstate rates in southern territory 15 percent on most commodities (smaller increases being authorized on a few). On petition of the railroads operating in Mississippi, the Mississippi Public Service Commission (hereinafter called the Mississippi Commission) authorized like percentage increases in the Mississippi intrastate rates on all less-than-carload freight and on all carload freight except certain specified commodities (described in detail hereinafter).

[1] *Increased Freight Rates, 1951,* 284 I. C. C. 589, decided April 11, 1952.

In a proceeding under section 13 (4) of the Interstate Commerce Act, the Commission increased the Mississippi intrastate rates on the excepted commodities by the percentages previously applied in Ex Parte 175. The Commission's order was grounded upon findings that the lower intrastate rates caused unjust discrimination against interstate commerce. The Mississippi Commission brought suit in the district court to set aside the order, and the court, after a hearing, and with one judge dissenting, entered a judgment enjoining enforcement of the order. The questions presented on this appeal are:

(1) Whether there is substantial evidence in the record made before the Commission to support its detailed findings, which covered, *inter alia,* the reasonableness of the interstate and the intrastate rates, the relationship between them, the effect on such relationship of the interstate rate increases, the conditions under which the two classes of traffic moved and were handled; also to support the Commission's ultimate finding that the Mississippi intrastate rates were not contributing their fair share to the railroads' total revenue requirements, and therefore discriminated against interstate commerce;

(2) Whether the district court erroneously substituted its opinion and judgment for that of the Commission as to certain questions of fact and as to the weight to be given to certain evidence;

(3) Whether the district court erred in holding that the evidence was legally insufficient because it did not show a separation of the railroads' revenues, expenses, and property values, as between interstate and intrastate operations in Mississippi;

(4) Whether the district court erred in holding that in order for the Commission to exercise its power to remove discrimination against interstate commerce there must be a showing that injury to interstate shippers has resulted and will continue to result because of the disparity between the interstate and intrastate rates; and

(5) Whether the district court correctly held that the Commission "committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole." This presents also the question whether the Commission actually did disregard the evidence as to passenger deficits.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C., Sec. 1 *et seq.*, are as follows:

> SEC. 13 (3): Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge,

classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

SEC. 13 (4): Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or

localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 15a (2): In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

STATEMENT

Since the end of World War II, the operating costs of the railroads throughout the United States has risen sharply, and the volume of traffic has declined. To meet the need for additional revenue, the Interstate Commerce Commission has given four general freight rate increases since the war. The first three, Ex Parte 162, 266 I. C. C. 537 (effective January 1, 1947), Ex Parte 166, 270 I. C. C. 403 (effective August 21, 1948), and Ex Parte 168, 276 I. C. C. 9 (effective September 1, 1949), authorized increases in interstate freight rates in the southern territory, including Mississippi, of 15, 25, and 10 percent, respectively. Following each of those decisions the Mississippi Commission allowed certain increases in the intrastate rates in Mississippi, but did not in each instance allow as large an increase as the Commission had authorized in the interstate rates.

The fourth general increase, Ex Parte 175, 284 I. C. C. 589 (decided April 11, 1952), out of which this case arose, allowed the railroads in southern territory a further increase in interstate rates of 15 percent (with certain exceptions [2] noted below). Thereafter the railroads operating in Mississippi applied to the Mississippi Commission for permis-

[2] An increase of only 12 percent was authorized in the interstate rates on sand and gravel in open-top cars, and the increase on lumber and articles listed in tariffs as taking the lumber rates was subject to a maximum of 12 cents per 100 pounds.

sion to increase their Mississippi intrastate rates to the extent authorized in Ex Parte 175 on interstate traffic. The Mississippi Commission allowed the percentage increase on less-than-carload traffic, and on some carload traffic, but as to carload shipments of the following excepted commodities it allowed only a part of the increases sought, or none at all, as indicated:

	Increase permitted (percent)
Cottonseed and products thereof	6
Soybeans and products thereof	6
Fertilizer and fertilizer materials	6
Lumber and articles taking lumber rates	6
Pulpwood	6
Sand and gravel (in open-top cars)	None
Brick and related articles	None

Following the refusal of the Mississippi Commission to authorize the increases sought, the railroads, proceeding under section 13 (4) of the Act, petitioned the Interstate Commerce Commission to increase the Mississippi intrastate rates to the extent authorized in Ex Parte 175 on interstate rates. The Commission, after a full hearing, granted the requested increases in the Mississippi intrastate rates on the above-named commodities. It found and concluded that the existing rates on those commodities were abnormally low and were not contributing their fair share of the earnings required to enable the railroads to provide adequate and efficient railway transportation service and thereby accomplish the purposes of the Interstate Commerce Act as set forth in the national transportation policy

declared by the Congress; and that the intrastate rates were causing, and for the future would cause, undue, unreasonable, and unjust discrimination against interstate commerce, and that such discrimination should be removed by applying to the Mississippi intrastate rates on the named commodities the same respective increases as are and for the future may be maintained by the railroads on like interstate traffic between points in Mississippi and points in adjoining States under the authorization in Ex Parte 175.

The Commission based its conclusion upon the following subsidiary findings, *inter alia:* that the conditions incident to the intrastate transportation of freight in Mississippi were not more favorable than those incident to the interstate transportation in Mississippi and adjoining States; that the interstate and intrastate traffic moved in Mississippi under substantially similar conditions, and were handled by the same crews on the same trains with the same equipment; that the existing interstate rates were just and reasonable; that the increases in intrastate rates would yield the railroads more than $550,000 additional revenue annually, and would not result in unreasonable rates or rates unreasonable in relation to interstate rates; and, with respect to the railroads' discontinuance of several allegedly unprofitable passenger trains in Mississippi, that there was no indication that the economies there-

by effected in Mississippi were greater than on other portions of the railroads' lines.

On the Mississippi Commission's petition for review of the order increasing the intrastate rates, a three-judge district court, one judge dissenting, set aside the Commission's order and enjoined its enforcement. The majority of the court held that the order was not supported by substantial evidence. The opinion shows on its face, however, that the majority reached that conclusion only after itself weighing the evidence and substituting its judgment for that of the Commission on questions of fact, which this Court has consistently held are within the exclusive province of the Commission to decide. It appears also that the decision was grounded on several propositions of law which, as will hereinafter be pointed out in detail, either have no application to the instant case or have been rejected as unsound in recent decisions of this Court.

THE QUESTIONS ARE SUBSTANTIAL

One of the major problems that has faced the Interstate Commerce Commission since the end of World War II has been the deteriorating financial condition of the railroads. Increasing costs and declining revenues seriously threatened the carriers' ability to render efficient service and carry out the National Transportation Policy (49 U. S. C. preceding Section 1). To deal with this situation, the Commission has granted certain

overall percentage increases in interstate freight rates. In the proceeding here involved, the Commission found that the increased operating costs were not confined to interstate traffic, but were incurred as well on Mississippi intrastate traffic.[3]

Although most of the state commissions have made adjustments in intrastate rates corresponding to those authorized by the Interstate Commerce Commission for interstate traffic, a small number have refused to do so. In such situations the affected railroads have ordinarily invoked the power given the Interstate Commerce Commission by section 13 (4) of the Interstate Commerce Act. That section empowers the Commission to remove discrimination against interstate commerce by raising intrastate rates, when it finds such action necessary to insure that "the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value

[3] "* * * The increase sought on Mississippi traffic was part of a nationwide increase proposed by the railroads in Ex Parte No. 175, which was authorized on interstate traffic throughout the country, including that to, from, and through Mississippi, and was applied also on intrastate traffic generally within most of the States. The railroads' needs for additional revenue to meet increased operating expenses, as determined in that proceeding, was the underlying basis for the increase authorized. The increased operating costs were not confined to interstate traffic, but were, and are, incurred as well on Mississippi intrastate traffic. That and other intrastate traffic was included in estimating the yield from the rate increase authorized." 291 I. C. C. 39, 63.

of the property devoted to the transportation service, both interstate and intrastate." *Florida* v. *United States,* 292 U. S. 1, 5.

In setting aside the Commission's order in the present case, the district court did not hold that the findings made by the Commission were inadequate. Certainly, it could not properly so hold, because the findings are substantially the same as those which this Court approved and sustained in the recent case of *King* v. *United States,* 344 U. S. 254. The decision appears to be based primarily upon what the majority of the district court said was a lack of substantial evidence to support the Commission's findings. It appears, however, that the court reached that conclusion because of a misconception on its part of its function as a reviewing court and because it attempted to try the case *de novo,* in disregard of the Commission's function as the evidence-weighing and fact-finding body.

(a) The district court substituted its judgment for that of the Commission on factual questions

As will be noted from its opinion, the district court paid lip service, at least, to the rule of administrative finality, long ago announced and frequently reiterated by this Court.[4] It stated

[4] *Interstate Commerce Comm.* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488.

that "Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts" (124 F. Supp. 814). The opinion contains many other statements, however, which show clearly that the court, in examining the record made before the Commission, did so not merely to determine whether there was substantial evidence to support the Commission's findings, but for the purpose of itself weighing the evidence and making its own findings and decision upon the factual questions involved, independent of and feeling in no sense bound by the findings of fact already made by the Commission.

For example, in commenting upon the Commission's finding that the increase granted in the intrastate rates would produce more than $550,000 per year in additional revenue for the railroads, the court said (124 F. Supp. 816):

> * * * This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. *The testimony upon this proposition is exceedingly weak.* * * * The evidence to support this finding *when weighed* in the light of the prevailing rule of law is not sufficient to amount to substantial evidence. [Emphasis added.]

Again, referring to the "testimony of the various witnesses and experts who testified for the carriers", the district court said (124 F. Supp.

816) *"their testimony has been fully weigh* * * * and fails to show substantiality sufficient uphold the order here under attack and the fi ings that were made." [Emphasis added.]

The two statements we have quoted, and oth which may be found in the opinion, show clear it seems to us, that the district court went mu further in weighing the evidence than this Co has indicated a reviewing court should go. recognize, of course, that the review must inclu "the whole record" and that "The substantiali of evidence must take into account whatever the record fairly detracts from its weigh *Universal Camera Corp.* v. *Labor Board,* 3 U. S. 474, 488. But, as this Court also said that case, the requirement for canvassing t whole record was not "intended to negative t function of [an agency] presumably equipped informed by experience to deal with a specializ field of knowledge, whose findings within th field carry the authority of an expertness whi courts do not possess and therefore must respe Nor does it mean that even as to matters not quiring expertise a court may displace t [agency's] choice between two fairly conflicti views, even though the court would justifiab have made a different choice had the matter be before it de novo. * * *" (p. 488 of 340 U. S

What this Court in the *Universal Camera* ca said a reviewing court should not do is, we subm exactly what the district court did do in the i

stant case. It displaced the Commission's "choice between two fairly conflicting views" as to questions of fact, even though, as shown by the opinion, "the whole record" contains substantial evidentiary support for the Commission's judgment and findings. Our contention to this effect is strongly supported by the dissenting opinion of District Judge Thomas, who stated that he had "considered the record as a whole" and was "of the opinion that on the authority of [the *King* case, *supra*] the order complained of has a rational basis in adequate findings, which are supported by subtantial evidence."

The decision of the district court appears also to have been influenced by its belief (124 F. Supp. 816) that "the Mississippi Commission was thoroughly familiar with the competition prevailing * * * and as a matter of fact *in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission* * * *." [Emphasis added.] This is a further indication of the court's unwillingness to accept the Commission's findings of fact, even though supported by substantial evidence.

Another such instance is the court's statement (124 F. Supp. 815) that "The findings of a state commission which is familiar with such conditions in the state, * * * when its opinion differs from the Interstate Commerce Commission's findings, detracts heavily against the findings of the

Interstate Commerce Commission, whose testimony is taken before an examiner."

The fact that the evidence received by the Commission was taken before an examiner, instead of before the entire Commission, appears to have prejudiced the court[5] against the evidence, for at still another place in its opinion it referred to that circumstance, using this language (124 F. Supp. 814):

> * * * the Mississippi Commission gave great study and investigation and heard much testimony before the Commission itself *and not through an examiner.* [Emphasis added.]

Thus the district court indicated its preference for the state commission's findings and judgment as to the facts over those of the Interstate Commerce Commission, the only body charged by Congress with the responsibility for ascertaining and determining whether the considered intrastate rates were causing discrimination against interstate commerce to the detriment of the national transportation system.

This action of the district court presents a substantial and very serious question for determination by this Court. For if the decision of the district court is permitted to stand, based as

[5] This attitude on the part of the court appears to be inconsistent with the Supreme Court's views as to the weight to be given an examiner's findings. See *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 492–497.

it is upon the court's (rather than the Commission's) weighing of the evidence and ascertainment of the facts, not only will fundamental principles of administrative law long ago established by this Court be overturned, but, what is more, the Commission's power under section 13 (4) to increase intrastate rates in order to remove discrimination against interstate commerce will be effectively nullified.

(b) The district court based its decision upon misconception of the law

Even though the undisputed evidence shows that it was not possible for the railroads to segregate their Mississippi intrastate operating revenues, costs, and property values from those pertaining to interstate operations, and this Court has many times held, under such circumstances, that segregation is not required,[6] the district court nevertheless assigned as one of its reasons for setting aside the Commission's order that "There was no separation made by the railroads of their revenues, expenses, and properties as between interstate and intrastate operations" (124 F. Supp. 815). This holding, we submit, was clearly erroneous.

[6] *Illinois Commerce Commn.* v. *United States*, 292 U. S. 474, 483; *Montana* v. *United States*, 2 F. Supp. 448, affd., 290 U. S. 593; *New York* v. *United States*, 331 U. S. 284, 335; *King* v. *United States*, 344 U. S. 254.

The opinion of the majority of the district court also contains the following statement (124 F. Supp. 813):

> In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, it must be shown, among other things, * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *.

While such a showing probably would be required in order to sustain a finding of unlawful preference and prejudice as to persons and localities, the Commission made no such finding in this case, and such preference and prejudice is in no sense involved. The Commission's order is grounded, rather, upon discrimination against interstate commerce, and there was no occasion or legal need for proof of any injury to interstate shippers. Thus, again, the district court based its decision upon a misconception of the law on the case before it.

Another error of the district court is indicated by the following statement in the opinion of the majority (124 F. Supp. 817):

> The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. * * *

An examination of the Commission's report will show that it did *not* disregard the evidence as to

passenger deficits. On the contrary, it gave careful consideration[7] to that evidence, found as a fact that it did not sustain the contention of the Mississippi Commission, and thereupon concluded that there was no sound basis for the contention.

It is clear, therefore, that what the district court actually found wrong with the Commission's consideration of the mentioned evidence

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[7] The Commission's report states (291 I. C. C. 39, 63):

"The Mississippi commission presented data designed to show that the discontinuance of several passenger trains in Mississippi and the furnishing of relatively less day-train service in that State than on other portions of the respondents' lines have resulted in proportionately smaller deficits in passenger revenue in that State. It argues that those changes have effected relatively greater economies in the respondents' intrastate operations than on other portions of their lines, requiring proportionately smaller contributions by the intrastate freight revenue to cover passenger-revenue deficits in Mississippi, which should be reflected in the level of the intrastate freight rates in relation to the interstate rates.

"The respondents' passenger-service operations have shown deficits in each of the years 1940 through 1951, except for 1943 through 1945. They have become progressively larger each year, aggregating $60,249,439 in 1951. The passenger-train eliminations in recent years have affected all portions of their system lines. There is no indication that the economies effected in Mississippi were relatively greater than on other portions of their lines. The novel theory of rate-making advanced by the Mississippi commission contemplates that the freight-rate structure would vary according to variations in the passenger revenue by territories, areas, States, and possibly by individual lines of railroad. Some of the respondents operate no passenger service. There is no sound basis for the contention that rate variations are justified because of such variations in passenger revenues."

was that the Commission did not accord to that evidence the weight the district court accorded to it, and did not reach the same conclusion and make the same factual finding the district court thought should be made thereon. This, we submit, was but another instance of the district court's misconception of the law and of its own function as a reviewing court, in substituting itself for the Commission as the evidence-weighing and fact-finding body.

As already pointed out, the findings made by the Commission in this case were, in substantially the same form, held adequate in *King* v. *United States, supra.* Section 13 orders based upon equivalent findings were thereafter sustained in *Montana* v. *United States,* 117 F. Supp. 174 (after remand, 344 U. S. 905, of a prior adverse decision of a district court); *Tennessee* v. *United States,* 113 F. Supp. 634, affd., 346 U. S. 891, reh. den., 346 U. S. 928; and *Louisiana* v. *United States,* 125 F. Supp. 180, affd., 348 U. S. 885, reh. den., January 10, 1955, — U. S. —.

In *Louisiana* v. *United States, supra,* which was decided during the present term of the Supreme Court (No. 351, October Term, 1954), the appellants emphasized, on page 20 of their reply to the motions to affirm, that the *Louisiana* case and the instant *Mississippi* case were companion cases, involving many of the same commodities, the principal difference between the two cases being "that the State of Mississippi prevailed in

the district court, whereas the State of Louisiana did not."[8] We agree as to the similarity of the two cases, and that they should be decided alike. Such being the situation, and this Court already having affirmed the judgment sustaining the Commission's order in the *Louisiana* case, we submit that the judgment in the *Mississippi* case setting aside the Commission's order should not be permitted to stand, but should be reversed and the order sustained. Compare *Montana* v. *United States*, 344 U. S. 905, in which this Court, without

[8] In their petition for rehearing, at pp. 7–8, the appellants in the *Louisiana case* stated:

"Mississippi has fared better than Louisiana in its 13th Section case. Involving substantially the same issues and having been heard about the same time, the three-judge federal district court below, by a 2 to 1 decision, enjoined the Interstate Commerce Commission from its attempt to interfere with and usurp the fixing of Mississippi intrastate freight rates. We attached the opinion of the Mississippi Federal District Court to our reply to motions to affirm (page 27, et seq.). Louisiana, praying for relief, meets with much frustration its adjacent neighbor, Mississippi, which has secured relief and cannot possibly lose it without having an opportunity to present oral argument to this Court. If on appeal of the Mississippi case the motion to affirm of Mississippi is granted, that state has permanent relief from the Interstate Commerce Commission's actions. If its motion to affirm is denied, the matter is then set down for oral argument. It is our understanding of the revised rules that the lower court decision may not be reversed in such matters without plenary consideration with briefs on the merits and oral argument. So it is not only possible but very probable that Mississippi will win its case and Louisiana lose its case under these peculiar and unique circumstances involving identical issues."

assigning the case for oral argument, remanded the judgment of the district court which had set aside a Commission order of the type here involved.

CONCLUSION

The problems posed by the instant case are recurring ones that inevitably arise whenever the Commission has to increase intrastate rates to remove discrimination against interstate commerce. Their resolution by the Supreme Court is of great concern to the Commission in carrying out its statutory duties, to the railroads in rendering efficient public service, and to the public as consumers, shippers and travelers.

For the foregoing reasons we believe the questions presented by this appeal are substantial and of public importance. We urge, therefore, that jurisdiction be noted, and, following the precedent of the *Montana* case, 344 U. S. 905, that the judgment of the district court be reversed, and that court directed to dismiss the complaint.

Respectfully submitted,

EDWARD M. REIDY,
General Counsel,

LEO H. POU,
Assistant General Counsel,
Interstate Commerce Commission.

FEBRUARY 1955.

APPENDIX A

In the United States District Court for the Southern District of Mississippi, Jackson Division

Civil Action No. 2120

MISSISSIPPI PUBLIC SERVICE COMMISSION, PLAINTIFF *v.* THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

OPINION

MIZE, J.

This is an action seeking to annul, set aside, and permanently enjoin enforcement of an order of the Interstate Commerce Commission entered February 1, 1954, in accordance with the report findings and conclusions entered November 2, 1953, in the proceeding No. 31164, *Mississippi Intrastate Freight Rates and Charges,* under which the respondent rail carriers operating in Mississippi were required to establish intrastate freight rates and charges in Mississippi no lower than the rates and charges prescribed and provided for in said report. The action was filed by the Mississippi Public Service Commission against the United States and the Commission, and served upon the Commission March 15, 1954. Answers have been filed by the United States, by the Commission, and railroad respondents operating in Mississippi. Certain shippers and associations, as named in the several motions, have intervened in support of the Mississippi Com-

mission. The case was heard on its merits and upon an application for a temporary injunction by consent at the same time. The temporary injunction was granted pending a final judgment.

The Commission proceedings were instituted October 17, 1952, upon the filing of a petition by seventeen railroads, with a supplemental petition filed November 21, 1952, seeking an order, after investigation, to authorize increase of intrastate freight rates in Mississippi, to the same extent and in the same manner as authorized by the Commission in respect to interstate rates and charges, in Ex Parte No. 175, *Increased Freight Rates, 1951,* 284 I. C. C. 589, hereinafter referred to as X–175. The railroads had, prior to filing petitions with the Commission, filed petitions with the Mississippi Commission, seeking approval of the increased rates, which were denied by order of that Commission, entered November 8, 1952. By order of December 5, 1952, Division 1 of the Commission ordered such investigation and a hearing before an examiner for February 2, 1953, at Jackson, Mississippi.

After the hearing a report by Examiner Vandiver was filed and served on May 27, 1953. The proposed report found that the intrastate rates imposed by the Mississippi Commission on cottonseed and products thereof, soybeans and products thereof, fertilizer and fertilizer materials, lumber and articles listed as taking the lumber rates, pulpwood, sand and gravel, cement, brick and related articles in the brick list, and refined petroleum in tank cars, were abnormally low, and traffic thereunder fails to produce its fair share of revenue to enable railroad respondents to pro-

vide adequate and efficient service, and such rates cause undue, unreasonable, and unjust discrimination against interstate commerce. The Mississippi Commission and three protestants filed exceptions to said report, and respondent railroads filed reply thereto.

The Commission entered its report on November 2, 1953, 291 I. C. C. 39. Ultimate findings of the Commission are set forth in the report and are substantially the same as those proposed by the Examiner. The report provided that an order would be issued making the findings effective, unless notified within 30 days after service, by the Mississippi Commission, that it would promptly permit the approved increases. Upon petitions of the Mississippi Commission, the Commission, by orders dated November 25 and December 23, 1953, extended the date on which such notification should be given to February 1, 1954. The Mississippi Commission and three protestants filed petitions for reconsideration of the report of November 2, 1953, which were denied by the Commission order of February 1, 1954, under which respondent railroads were ordered to establish the intrastate rates prescribed for the commodities named in the report, on March 19, 1954, effective upon five days' notice. Petition of the Mississippi Commission was filed March 9, 1954, to amend the order of February 1, 1954, so as to remove therefrom the requirement to increase intrastate rates on refined petroleum in tank cars. By Commission order of March 10, 1954, the order of February 1, 1954, was so amended.

The Commission authorized, in X–175, a general increase of fifteen percent on basic inter-

state freight rates and charges, subject to certain exceptions and modified increases, which was the fourth general increase since World War II. The railroads operating in Mississippi filed petition with the State Commission, seeking the same increases on intrastate rates and charges as authorized on interstate rates under X–175.

The Mississippi Commission had a full hearing and authorized an increase in intrastate rates and charges of the full fifteen percent on all less than carload freight and upon all carload freight, except as to carload line haul rates of brick and related articles upon which the Mississippi Commission granted no increase, cement, upon which the Mississippi Commission granted no increase, fertilizer and fertilizer materials, upon which the Mississippi Commission authorized a six percent increase, lumber, upon which the Mississippi Commission authorized a six percent increase, pulpwood, upon which the Mississippi Commission authorized a six percent increase, sand and gravel, upon which the Mississippi Commission granted no increase, cottonseed and products thereof, upon which the Mississippi Commission authorized a six percent increase, soya beans and the products thereof, upon which the Mississippi Commission authorized a six percent increase, cattle feed made 65% or more of cotton seed or soya bean products, upon which the Mississippi Commission authorized a six percent increase, and refined petroleum in tank cars, upon which the Mississippi Commission authorized an increase of six percent. Upon all of the commodities excepted the increase authorized by the Interstate Commerce Commission was fifteen per-

cent with the single exception of sand and gravel upon which the interstate increase was twelve percent.

Cattlefeed made 65% or more of cottonseed or soybean products is not involved in this case as same was excepted from the report and order of the Interstate Commerce Commission. Refined petroleum in tank cars is likewise not involved in this proceeding for the reason that, by order dated February 23, 1954, the Mississippi Commission ordered that the intrastate rates for that commodity be increased the full fifteen percent authorized in Ex Parte No. 175. All of the remaining excepted commodities are in issue, there being involved the differential in the increases authorized by the Mississippi Commission and the Interstate Commerce Commission as outlined above.

The Commission report, finding 3, prescribed the interstate increase on all the commodities excepted by the Mississippi Commission. The rates involved herein relate only to said excepted commodities as an issue, of which refined petroleum in tank cars was removed by the Commission order of March 10, 1954, entered after the Mississippi Commission had approved the interstate increase for that commodity.

The ultimate issue relates to the validity of the orders of the Commission requiring the rail carriers to increase their Mississippi *intrastate* rates and charges to the same level prescribed in the report of November 2, 1953. Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and

localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce. Paragraphs XII and XIII of the complaint allege illegality of the final report and order of the Commission, on grounds there stated of violation of constitutional rights; action beyond the scope of statutory authority; unsupported by substantial evidence or contrary to evidence; and arbitrary action.

The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law in recent years has been fully announced and declared by the Supreme Court.

The Interstate Commerce Commission has no general authority to regulate intrastate rates. The mere existence of a disparity between interstate and intrastate rates does not authorize the Commission to enter a field properly consigned and belonging to the state regulatory body and interfere with rates established by state authority. Section 13 (4) of the Interstate Commerce Act does not automatically require complete uniformity in intrastate and interstate rates but the state commission may fix a lower intrastate rate than the interstate rate, unless an undue advantage to intrastate traffic and an unfair discrimination against interstate traffic results therefrom. This rule was properly and clearly declared by the Supreme Court of the United States in the case of *North Carolina* v. *United States,* 65 S. Ct. 1260, 325 U. S. 507, 89 L. Ed. 1760.

The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.

In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates. *North Carolina* v. *United States, supra.* The Court further held in that case that the power of the Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operation costs and to yield a fair return on the value of the property directed to the transportation service both interstate and intrastate. Moreover, it reaffirmed the doctrine

that the Commission could not require intrastate rates to be raised above a reasonable level.

The Interstate Commerce Commission is granted wide powers to prescribe rates on interstate freight as well as other transportation matters. That function belongs primarily and excusively within the limits of the Act to the Commission; however, its authority over intrastate rates is limited as above set out and Section 13 (4) of the Act was never intended to deprive the state commission of their primary authority to regulate intrastate rates. There is a point where the power of the state commission ceases and the power of the Interstate Commerce Commission begins, but as stated by Mr. Justice Black in the *North Carolina* case, it is not always easy to designate that point.

Other principles of law have been clearly declared by the Supreme Court of the United States. Intrastate traffic must bear a fair proportionate share of the costs of maintaining an adequate railway system. *Wisconsin Railroad Commission* v. *Chicago V.* [*B.*] *& Q. Railway,* 257 U. S. 563. It is within the power of the Interstate Commerce Commission to determine if the intrastate rates do that; however, before it can alter intrastate rates the justification therefor must clearly appear and be supported by substantial evidence. It is not sufficient that there be simply a difference between interstate rates fixed by the Commission and the intrastate rates as fixed by the state commission. The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates that the Mississippi Commission

gave great study and investigation and heard much testimony before the Commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commerce Commission, then its power and its conclusions override that of the state commission, but a mere disparity of itself in the rates fixed by each commission is not sufficient. *Florida* v. *United States,* 282 U. S. 194. Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts, but if such findings are not supported by substantial evidence, then the matter is one for the court to determine and such order cannot be upheld. In determining in the first instance whether intrastate rates should be raised or lowered the Interstate Commerce Commission is allowed wide latitude in directing that intrastate rates be increased and may take into consideration material and reports which were before the Commission in previewing a nationwide increase in interstate freight rates. The Commission's jurisdiction over intrastate rates is not limited to cases where those rates are confiscatory. *King, et al.* v. *United States, et al.,* 344 U. S. 254.

The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress

in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Supreme Court of the United States in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission.

Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that frequently appears in the construction of many laws. There are many instances in which judgments are required to be supported by substantial evidence. The verdicts of juries in some states are required to be supported by substantial evidence and it then becomes a question for determination by the court as to whether or not a verdict is supported by substantial evidence and if it is not, then the court reverses and directs that judgment be entered when not supported by substantial evidence. The decisions on this matter are numerous. See Words and Phrases, Permanent Edition, Vol. 40, 1954, Annual Pocket Part, P. 88. Substantial evidence is a term that cannot be defined defi-

nitely, but whether the evidence in a particular case amounts to substantiality must be determined from the facts of each case as it arises.

The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order. The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission

were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers. The record of the evidence in the case reflects a favorable financial condition of the railroads involved herein when contrasted with that of the railroads of the country as a group. The statistics introduced in evidence and reflected by the various reports show that the national average of returns for the railroads was 4.02 percent; whereas, the condition of the railroads involved in this controversy was in a better financial situation and their earnings greater than the 4.02 percent. The Interstate Commerce Commission in Ex Parte No. 175, when granting freight rate increases took into consideration the losses sustained by the railroads in passenger operations. This was correct and was upheld in *King* v. *United States,* 344 U. S. 254, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi. There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient. Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the In-

terstate Commerce Commission, whose testimony is taken before an examiner. The record shows in this case that the need of the carriers involved here for additional revenue is not as great as the needs of the railroads of the country as a whole. The statistics introduced in evidence and now in the record demonstrate this.

The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are concerned in Mississippi. When the intrastate freight rate level on a given commodity is at such level that any increase in the rate would have the effect of diverting traffic from the rail carriers to competing forms of transportation, then it would follow that the revenue derived would be diminished rather than increased. In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission* v. *Great Western Railway Company,* 141 Fed. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors. The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of

the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.

The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000.00 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. The testimony upon this proposition is exceedingly weak. It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased. The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under

attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved. The record is clear in this case that the revenue needs of the railroads of the Eastern District and in the South or Western District and the financial condition of the petitioning railroads involved in this case are in better condition than the national average.

On the trial before this Court there was introduced in evidence Plaintiff's Exhibit 4, which was a petition by the railroads made to the Interstate Commerce Commission seeking a modification of the Commission's order so as to authorize lower rates upon sand and gravel and Plaintiff's Exhibit 5, being an order thereon granting the prayer of the petition. There was no objection to the introduction of these documents but even if they should have been irrelevant as having occurred since the filing of the suit, it still would be true that there was not sufficient substantial evidence to support the order but if these documents be considered they simply demonstrate that the higher rate given the railroads would cause the traffic to divert to competitors. The commodities involved in this controversy require shorter hauls than do the interstate shipments and are therefore more susceptible to competition. On all of the commodities involved in the controversy the competition by carriers is keen and

would come not only from regulated trucks for hire but from unregulated trucks and from trucks owned and operated by the shippers themselves. This is clearly shown by the record by positive testimony and overwhelmingly overthrows and overrides the opinions of the experts.

The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than passenger deficits of the same railroads for their system-wide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Commission to give proper consideration to this testimony. *King* v. *United States, supra.*

At the time the original complaint herein was filed and at the time of the hearing and when the case was submitted to the Court for judgment, cement in carload lots was one of the commodities involved and an intervention by the Marquette Cement Manufacturing Company was allowed but since that date the Marquette Cement Manufacturing Company, one of the intervening plaintiffs, moved to be permitted to withdraw

its intervention for the reasons stated in the motion and likewise the plaintiff moved to amend its complaint so as to eliminate cement from the commodities at issue and without objection an order was entered on the 13th day of September 1954, sustaining each of said motions. The complaint was amended so as to eliminate cement and the petition of the Marquette Cement Company was dismissed for the reasons stated in said motions, there being no objections from any one to these motions.

For the reasons herein stated the order of the Interstate Commerce Commission will be set aside and its enforcement enjoined.

Order may be drawn in accord herewith.

Jackson, Mississippi, September 21, 1954.

(S) E. R. HOLMES,
United States Circuit Judge.

(S) S. C. MIZE,
United States District Judge.

———— ————,
United States District Judge.

In the United States District Court for the Southern District of Mississippi, Jackson Division

Civil Action No. 2120

MISSISSIPPI PUBLIC SERVICE COMMISSION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

OPINION

THOMAS, *District Judge,* dissenting:

As stated by Judge Mize in the majority opinion, the paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law is well settled "that an order of the Commission is entitled to finality, and may not be set aside, modified, or disturbed on judicial review, if such order of the Commission lies within the scope of the Interstate Commerce Statute, and is based upon adequate findings that are supported by substantial evidence.[1] There is no question but that the order of the Commission lies within the scope of the statute. In discussing the limitation upon the right of courts to review orders of the Commission, in the case of Interstate Commerce Commission *v.* Union Pacific Railroad

[1] *Louisiana Public Service Commission* v. *United States of America and the Interstate Commerce Commission*, U. S. District Court, Eastern District of Louisiana, decided July 9, 1954.

Company, 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, the court said:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In my opinion, the findings made by the Commission in support of its conclusion are entirely adequate, and fulfill the needs emphasized in the case of *North Carolina et al.* v. *United States et al.*, 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260.

The record must be considered as a whole. I have considered the record as a whole and am of the opinion that on the authority of *King, et al.* v. *United States et al.*, 344 U. S. 254, 97 L. Ed. 301, 73 S. Ct. 259, the order complained of has a rational basis in adequate findings, which are supported by substantial evidence.

I respectfully dissent from the majority opinion.

(S) DANIEL H. THOMAS.

APPENDIX B

In the United States District Court for the Southern District of Mississippi, Jackson Division

Civil Action No. 2120

MISSISSIPPI PUBLIC SERVICE COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINAL JUDGMENT

This cause came on for hearing before the statutory three-judge court duly convened by the Chief Justice of the Circuit pursuant to Sections 2284 and 2325 of Title 28 of the United States Code by designating as additional judges the Honorable E. R. Holmes, Justice of the Court of Appeals for the Fifth Circuit, and the Honorable Daniel H. Thomas, Judge of the United States District Court for the Southern District of Alabama, upon final hearing upon the complaint of the Mississippi Public Service Commission, plaintiff in the above entitled cause, praying for a final decree that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, and each of them, are unlawful, null and void, and that the enforcement of said report and order be permanently enjoined, restrained, annulled and set aside, and that the Interstate Commerce Commission be directed to enter an order dismissing the proceedings entitled

In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, in which said report and order were entered.

It appearing that the above entitled cause was duly set down for final hearing at Jackson, Mississippi, on the 31st day of May, 1954, and that proper notice of said hearing was given to the plaintiff, the defendants and to all intervenors herein, and that all parties were present in person or by counsel; and, upon consideration of the plaintiff's verified complaint and the answers thereto, and upon consideration of the record of the proceedings before the Interstate Commerce Commission in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, and upon consideration of all other evidence introduced at the hearing, and the arguments and briefs of counsel, the Court is of the opinion and finds that the plaintiff, Mississippi Public Service Commission, is entitled to a permanent injunction and to the relief prayed for in its complaint for the reasons more fully set forth in majority opinion heretofore filed in this case.

It is, therefore, ordered, adjudged and decreed by said statutory three-judge court that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, both having been entered in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, and each of them, are unlawful, null and void, and that the enforcement thereof be, and it is hereby, permanently enjoined, restrained, annulled and set aside, and that the Interstate

Commerce Commission be, and it is hereby, directed to enter an order dismissing the above entitled proceedings.

It appearing to the Court that the parties intervening on the side of the defendants in this action are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

So ordered, adjudged and decreed this the 12th day of October, 1954.

/s/ E. R. HOLMES,
Judge of the Court of Appeals for the Fifth Circuit.

/s/ S. C. MIZE,
Judge of the United States District Court for the Southern District of Mississippi.

I dissent from the foregoing for the reasons set forth in my dissenting opinion heretofore filed in this cause.

/s/ DANIEL H. THOMAS,
Judge of the United States District Court for the Southern District of Alabama.

U. S. GOVERNMENT PRINTING OFFICE: 1955

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 588

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
APPELLANTS

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES

No. 589

INTERSTATE COMMERCE COMMISSION, APPELLANT

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, the appellees noted in the margin *

* American Sand and Gravel Company; Columbus Gravel Company; Crystal Springs Sand and Gravel Company; Gatesville Sand and Gravel Company; Green Brothers Gravel Company; and Hammett Gravel Company, all of whom are shippers of sand and gravel; and Masonite Corporation and The Flintkote Company, who are shippers of pulpwood.

move that the judgment of the District Court be affirmed on the ground that the questions raised by appellants are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

These are direct appeals from a judgment of a statutory three-judge District Court entered October 12, 1954, pursuant to 49 U. S. C. § 17 (9) and 28 U. S. C. §§ 2321-25 which set aside, annulled and permanently enjoined the enforcement of an order of the Interstate Commerce Commission entered pursuant to investigation under Section 13 (4) of the Interstate Commerce Act, 49 U. S. C. § 13 (4), in a proceeding entitled *Mississippi Intrastate Freight Rates and Charges,* 291 I.C.C. 39.

The Interstate Commerce Commission in 1952 granted the most recent of several general freight increases on interstate traffic in a proceeding commonly known as Ex Parte 175. *Increased Freight Rates, 1951,* 284 I.C.C. 589. Following the decision in Ex Parte 175, the Mississippi Public Service Commission, on petition of the railroads operating in Mississippi, and after full hearings, granted similar increases on all Mississippi intrastate traffic, with the exception of certain specified commodities. On some of the commodities, the Mississippi Commission authorized an increase, but in an amount less than that authorized by the Interstate Commerce Commission on interstate rates; on two of the commodities it authorized no increase.[1] Thereafter the railroads, proceeding under Section 13 (4) of the Interstate Commerce Act, petitioned the Interstate Commerce Commission to authorize an in-

[1] The details are set out in the Statement as to Jurisdiction (No. 589, pp. 7-8).

crease in the Mississippi intrastate rates to the full extent authorized in Ex Parte 175 on interstate rates. The Commission, after a hearing, found that the Mississippi intrastate freight rates on these "excepted commodities" caused undue, unreasonable and unjust discrimination against interstate commerce, and ordered them to be increased to the level of interstate rates. 291 I.C.C. 39.

The Mississippi Public Service Commission filed a petition for review of the order in the District Court. Interested shippers and railroads intervened as plaintiffs and defendants, respectively. The District Court, after full briefs and arguments, concluded that the order of the Commission was not supported by substantial evidence, and directed judgment accordingly. *Mississippi Public Service Commission* v. *United States*, 124 F. Supp. 809. One judge dissented.

ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. Appellants seek to have this Court determine issues of fact by detailed review of a voluminous record. This the District Court has done, with obvious care, and with full appreciation of the standards of review laid down by this Court. Affirmance of the decision below will be fully consistent with the prior decisions of this Court.

I

APPELLANTS SEEK A RE-REVIEW OF THE EVIDENCE

The District Court stated (124 F. Supp. at 813): "The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission." That question the Dis-

trict Court answered in the negative. Appellants, of course, disagree, and ask this Court to re-examine the record to determine whether the District Court was correct.

This Court has indicated clearly its attitude toward such requests. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In that case the Court spelled out the proper standard of review of administrative orders, and then continued (340 U. S. at pp. 490-491):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."[2]

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[2] See also National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498; Radio Corporation of America v. United States, 341 U.S. 412. In National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, the Court reaffirmed (at p. 410) its prior statement that "This Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way or the other, though fair-minded judges could find it tilting either way.'" The Court also noted that the rule had special application to cases where "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case"—a statement equally applicable to the statutory standard in Section 13 (4) of the Act: "undue, unreasonable or unjust discrimination against interstate or foreign commerce".

Examination of the opinion below shows that the District Court neither misapprehended nor misapplied the standard of review established by this Court in the *Universal Camera* case.

In the *Universal Camera* case this Court (making it clear that it was speaking of the standards set by the Administrative Procedure Act generally as well as by the Labor Management Relations Act, see 340 U.S. at pp. 487, 490) emphasized the responsibility of a court called upon to enforce or set aside an administrative order. "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." 340 U.S. at 490. What the reviewing court should do was clearly set forth (*id.* at 487-488):

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The District Court opinion demonstrates that the court was proceeding in the light of the *Universal Camera* case and fully understood the standards which it established. The District Court said (124 F. Supp. at p. 814):

> "The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Supreme Court of the United States in Universal Camera Corporation vs. N.L.R.B., 340 U.S. 474, held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission."

The court correctly added (*id.*, p. 815) that it "does not have the power to settle disputes in the testimony,

but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order."[3]

Not only did the court correctly apprehend its duty and function, but it also properly discharged them. The case was under advisement by the District Court for nearly four and one half months. The judge who wrote the opinion for the majority was the same judge who denied appellees' request for a temporary restraining order at the outset of the case—a change of attitude which could result only from a study of the whole record. The opinion bears evidence of the care with which it was prepared.

Appellants refer to several sentences in the opinion below which, they say, show that the District Court "misapprehended or grossly misapplied" the rule of the *Universal Camera* case. When the sentences are read in context, they show quite the contrary, and suggest, rather, that it is with appellants, and not with the court below, that the misapprehension lies. Thus, in criticizing the court for "weighing the evidence" (Statement as to Jurisdiction No. 589, pp. 13-14), appellants refer to the testimony of experts who predicted increased *revenue* from increased *rates,* and quote the court's statement that their testimony is exceedingly weak, but omit the next two sentences which explain what the court meant. The Statement also quotes the statement that "their testimony has been fully weighed" but omits the next clause in the sentence

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[3] There may be room for doubt that the dissenting judge below, who did not refer to the Universal Camera case, but relied for his principles of review on the 1912 decision of this Court in Interstate Commerce Commission v. Union Pacific R.R. Co., 222 U.S. 541, correctly apprehended the function and duty of a reviewing court.

stating how it was weighed.[4] The District Court actually said (124 F. Supp. at p. 816):

> "The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase is given. The testimony upon this proposition is exceedingly weak. *It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased.* The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.
>
> "The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully

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[4] It appears that appellants regard the court's use of the word "weigh" as proof of its error. In fact, one cannot determine whether evidence is substantial, even when it stands alone, without "weighing" it in the sense in which the word was used by the District Court, and certainly one cannot determine whether evidence is substantial "on the record as a whole" without "weighing" it, in that same sense. As this Court said in the Universal Camera case (340 U.S. at p. 488): "The substantiality of evidence must take into account whatever in the record fairly detracts from its *weight*". (Italics supplied.)

> weighed *in the light of the entire record and proceedings in this cause and when viewed in this light* the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved." (Italics supplied.)

The District Court was applying the rule announced in *Florida* v. *United States,* 282 U.S. 194— that it is essential in a Section 13 (4) proceeding to show that the requested increase in freight rates will result in increases in revenue. Moreover, it correctly described the evidence. Detailing all of the facts would unduly extend this Motion, but with respect to sand and gravel, for example—one of the commodities on which the Mississippi Commission authorized no increase in intrastate rates—the finding by the Interstate Commerce Commission of increased revenue was based on a simple multiplication of the amount of the increase per ton in rates by the tonnage carried the previous year at the lower rate, accompanied by the assertion, admittedly not based on knowledge of conditions in Mississippi, that an increase in rail rates would cause no diversion of shipments to trucks (Tr. pp. 35-37, 41-42, 100, 241-243, 277, 333). The record as a whole, however, contains overwhelming evidence that the rate increase would mean a revenue *decrease*. The facts with regard to Mississippi geography, the sand and gravel competitive market conditions in Mississippi,

and the history of Mississippi sand and gravel rates, all of which show marked divergence from any national pattern, are fully set out.[5] There is specific evidence, backed up by complete analysis of these facts, that a rate increase will result in the diversion of enough present rail movements to trucks that the total rail revenue will decrease, contained in the testimony and exhibits of the rate expert for the Mississippi Public Service Commission, who was thoroughly acquainted with Mississippi conditions. There is unqualified testimony to the same effect by four major intrastate rail shippers of sand and gravel in Mississippi—the men who decide what mode of transportation will be used. See Tr. 231-236, 464, 466-474, 648-681, 699-720, 742-751; Green Dep. pp. 207, 10-19, 21-23, 38, 45; Exhs. 73, 104, 107. Full discussion of the testimony and exhibits on this and other commodities would take many pages; suffice it to say that the District Court was fully warranted in characterizing the assumptions on which the Commission's finding was grounded as "weak" and in concluding, on the record as a whole, that the finding that there would be a

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[5] Commercial deposits of sand and gravel, for example, are so numerous in Mississippi that even at present rail rates over 80 percent of the state can now be served with an economic truck haul. Tr. 661-663; Green Dep. 18-19; Exhs. 106-107. The 12 percent increase in intrastate rail rates authorized by the Interstate Commerce Commission would increase the economic truck operating radius enough to permit the entire state to be thus served. Green Dep. 18-19. Even the present rail rates on sand and gravel are negotiated rates, agreed to by the carriers and the shippers in 1949. All the witnesses agreed that these 1949 rates substantially reduced the existing scale for the purpose of meeting truck competition and holding sand and gravel traffic on the rails. Tr. 85-86, 235-236, 648-653, 658-659, 699-700. There is no evidence that the intensity of truck competition has decreased.

$550,000 increase in revenues from the increased rates was not supported by substantial evidence.

Again, the Statements as to Jurisdiction quote (No. 589, p. 15; similarly, No. 588, pp. 9-10), as a "further indication of the court's unwillingness to accept the Commission's findings of fact", an observation of the District Court that the Mississippi Commission was in a better position than the Interstate Commerce Commission to judge the effect of competition on the carriers. That the observation is correct cannot be, and indeed is not, denied. It is equally clear, moreover, that the implication which appellants seek to read into it—that the court was refusing to accept the findings of the Interstate Commerce even when supported by substantial evidence—is directly contrary to the position of the District Court if one reads the whole, and not merely a part, of the sentence in which the observation is made. Placed in proper context the statement reads as follows (124 F. Supp. at p. 816):

> "The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, *of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.*" (Italics supplied.)

Certainly a reviewing court may properly accord to the decision and order of the Mississippi Public Service Commission, which is a part of the record, just as it does

to the report of a trial examiner, "such probative force as it intrinsically commands". See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 495.[6]

II

THE ALLEGED ERRORS OF LAW ARE WITHOUT SUBSTANCE

In addition to their request that this Court should re-evaluate the record in this case to determine whether the District Court has properly applied the rule of the *Universal Camera* case, the Statements as to Jurisdiction request that this Court correct certain alleged errors of law by the District Court. The points raised are at best peripheral rather than basic, and in any event the criticisms are wholly without substance.

Appellants contend (Statements, No. 588, pp. 8-9; No. 589, pp. 4, 17) that the lower court erred in "holding" that the evidence was legally insufficient because it did not show a separation of the railroads' revenues, expenses, and property values as between interstate and intrastate operations. The District Court made no such "holding". What it *did* do was simply to point out the indisputable fact that in determining whether

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[6] The same comment is equally applicable to the related criticism of the District Court (Statements as to Jurisdiction, No. 588, p. 9; No. 589, p. 16) in referring to the fact that the Mississippi Public Service Commission heard the case directly and not, as in the Interstate Commerce Commission, through an examiner. What the District Court said is admittedly correct, and we believe wholly unobjectionable (124 F. Supp. at p. 814): "The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates that the Mississippi Commission gave great study and investigation and heard much testimony before the Commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commission, then its power and its conclusions override that of the state commission, . . .".

there was substantial evidence to support the finding that the Mississippi intrastate rate was "abnormally low," it did not have such evidence before it. The opinion states (124 F. Supp. at p. 815):

> "There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers. . . . There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient."[7]

Again, both Statements (No. 588, p. 8; No. 589, p. 18) seek to show a misconception of the law by the Dis-

[7] The carrier's own evidence showed that the present rates, instead of being "abnormally low", in fact produced an average per car revenue on sand and gravel, for example, 23.5 percent higher than the carriers system-wide average for that commodity. Compare Exh. 12 (system-wide, per car average $45.95), and Exh. 7 (Mississippi intrastate, per car average $56.74). The railroads' witnesses conceded that the average length of the interstate haul on these commodities is longer than the average 73 mile haul wholly inside Mississippi. Tr. 199, 203, 215, 219, 241.

trict Court by quoting an isolated statement in the opinion that in order to authorize the Commission to exercise its power to nullify intrastate rates under Section 13 (4) of the Act, it must show that injury to interstate shippers has resulted and will continue to result because of the disparity in rates. While it is true that in the sentences quoted by appellants the District Court inadvertently used a conjunctive rather than a disjunctive in spelling out the essential elements of a Commission order under Section 13 (4), it is clear beyond doubt that it *was* an inadvertence The opinion is crystal clear that the District Court knew that there were alternative grounds upon which the Commission might properly order an increase in intrastate rates, and that either would suffice. The court said (124 F. Supp. at p. 813):

> "Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce."

There is not even a suggestion, anywhere in the opinion, that the conclusion of the District Court was based in the slightest degree upon a failure of the Commission to find injury to interstate shippers.

Finally, appellants urge (Statements, No. 588, p. 10; No. 589, pp. 18-20) that the District Court erred when it stated that the Interstate Commerce Commission improperly disregarded the evidence that passenger deficits were substantially lower in Mississippi than in

the South or the nation as a whole. That the Commission did in fact disregard the evidence—that it was in error in stating "There is no indication that the economies effected in Mississippi were relatively greater than on other portions of their lines", 291 I.C.C. 39, 63—requires an examination of the record, which we understand will be made in a Motion to Affirm to be filed by the Mississippi Public Service Commission. Suffice it here to say that the Commission's criticism of the evidence on this point as "a novel theory of rate-making" *(ibid.)* appears to be directly contrary to the teaching of *King* v. *United States,* 344 U.S. 254.[8] Indeed, it should be noted that the Commission's Statement as to Jurisdiction (No. 589, pp. 18-19) does *not* urge that the evidence can be disregarded on this ground; it insists only that the Commission did consider it.

III

THE AUTHORITIES CITED BY APPELLANTS IN FACT SUPPORT THE MOTION TO AFFIRM

As we have earlier pointed out, this Court, when requested to re-examine a long and complex record to determine whether administrative findings are supported by substantial evidence, will do so only in "the rare instances when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Nation Labor Relations Board,* 340 U.S. at p. 491. That it has recently granted motions

[8] In the King case the Court stated that "there is no showing that the character of operating conditions in Florida intrastate passenger traffic differs substantially from that of interstate passenger operations in the southern territory generally." 344 U.S. at pp. 264-265. The inference from that and other statements in the opinion is that if passenger deficits in one state were substantially different from the general pattern, that fact would be relevant in determining intrastate freight rates.

to affirm lower court decisions upholding Commission orders is, therefore, no matter for surprise. *Tennessee* v. *United States,* 346 U.S. 891, rehearing denied, 346 U.S. 928; *Louisiana* v. *United States,* 348 U.S. 885, rehearing denied January 10, 1955, 348 U.S. —. Nor are such affirmances authority for appellants here; they demonstrate, rather, that the Court means precisely what it says when it refers to the "rare instances" when it may appropriately re-examine the lower court's conclusion.

Appellants, however, seek to make of the affirmance of the *Louisiana* case a pre-judgment on the instant case by referring to that case and the present one as "companion cases" and by asserting that the evidence in both cases was "substantially similar". In fact, the two cases are in no sense "companion cases"; neither the Mississippi Public Service Commission nor any of the shippers who are appellees here participated in any way in the Louisiana case, nor do they have any knowledge of the record therein. Moreover, there is no evidence in the record in this case that the conditions in Mississippi and Louisiana are similar in any respect, but, fortuitously, there *is* evidence that, for example, as to sand and gravel, conditions are vastly different. Since the transportation cost of sand and gravel far exceeds the actual sales price of the commodity itself,[9] an essential factor in deter-

---

[9] Appellee American Sand & Gravel Company showed that its average selling price of sand and gravel was 70.3 cents per ton, and its average freight bill on present Mississippi intrastate rates was $1.11 per ton. Tr. 664-665. Although the railroads therefore already get 58 percent more revenue for the transportation of sand and gravel than the shipper gets for its sale, with the 12 percent increase authorized by the Interstate Commerce Commission the railroads would get 77 percent more than the shipper. *Ibid.*

mining whether to use rails or trucks to move sand and gravel is the length of the haul, which in turn depends upon the extent to which deposits are available near where sand and gravel is needed. Heyward Green, a sand and gravel operator who owns and operates plants in both Louisiana and Mississippi, testified (Dep. p. 30):

> "Q. You mentioned that you are confronted here, and you feel the railroads should face the problem which is local to Mississippi; by that do you mean the . . . numerous sand and gravel deposits, which makes for this truck competition?
>
> "A. Yes, sir; the other states are not geographically situated as Mississippi as to sand and gravel deposits; there are now large areas of Louisiana barren of sand and gravel deposits, and other states have a similar setup; . . . "

J. D. Lewis, likewise testified (Tr. 659): "Mississippi is different from many other States, in that there is an abundance of sand and gravel scattered over the State."

What appellants really urge is that once the Interstate Commerce Commission has determined that intrastate rates in one state should be increased under Section 13 (4), and that decision has successfully survived a challenge in the courts, the decision should be regarded as conclusive upon all other intrastate rates. If so, there has been a vast waste of time over many years, and Section 13 (4) has a meaning utterly different than that which anyone heretofore had imagined. We venture to think it will come as somewhat of a surprise to the Court to find it suggested that when it found the Louisiana case not to be one of the rare instances in

which a re-examination of the record was necessary, it was at the same time deciding that any court which thereafter held a Section 13 (4) order arising out of Ex Parte 175 to be unsupported by substantial evidence was due for a summary reversal.

A final word is perhaps warranted on *Northern Pacific Railway Co.* v. *Montana,* 344 U.S. 905, which the Commission urges as a precedent for summary reversal. The case has no resemblance whatever to the present one. There the District Court had found that the findings of the Interstate Commerce Commission were insufficient under the authority of *North Carolina* v. *United States,* 325 U.S. 507. While the appeal was pending, the Court handed down its decision in *King* v. *United States,* 344 U.S. 254, which put the *North Carolina* case in a new light. This Court thereupon reversed the District Court in the *Montana* case and remanded the proceeding "to the District Court for further proceedings in the light of *King* v. *United States,* decided this day". 344 U.S. 905. After remand the District Court sustained the order of the Interstate Commerce Commission, 117 F. Supp. 174, holding that the findings were adequate "in the light of *King* v. *United States*". Here there is no intervening decision and, as we have pointed out above, the court below gave full effect to the decisions of this Court. Here the problem is, essentially, only as to the substantiality of evidence to support the findings—an issue which is of no general significance but rather one which is unique on this record.

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

R. W. HEIDELBERG, JR.,
Hattiesburg, Mississippi,
HENRY HILBUN, JR.,
Laurel, Mississippi,
JIM C. FLOYD,
Meridian, Mississippi,
CHARLES A. HORSKY,
701 Union Trust Building,
Washington 5, D. C.,
Counsel for Appellees.

MARCH, 1955.

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 588

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL,
Appellants

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET EL, ... *Appellees*

No. 589

INTERSTATE COMMERCE COMMISSION, *Appellant*

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET EL, ... *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

MOTION TO AFFIRM

J. P. COLEMAN, *Attorney General*

DUGAS SHANDS, *Assistant Attorney General*

New Capitol, Jackson, Miss.

Counsel for Appellee, Mississippi Public Service Commission

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

MOTION TO AFFIRM

Now comes the Mississippi Public Service Commission, appellee in the above entitled causes, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, and moves that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

There is here involved direct appeals by the Interstate Commerce Commission and the Illinois Central Railroad

Company and others from a final judgment entered October 12, 1954, by a three-judge District Court convened pursuant to Sections 2284 and 2325, Title 28, U. S. C., setting aside and permanently enjoining the enforcement of an order of the Interstate Commerce Commission attempting to prescribe intrastate freight rates for the transportation of certain commodities within Mississippi under Section 13 (4) of the Interstate Commerce Act, 49 U. S. C., Sec. 13 (4). The majority opinion of the court below is reported at 124 F. Supp. 809, and is attached as Appendix A to both jurisdictional statements filed herein.

The railroads here involved sought before the Mississippi Public Service Commission increases in intrastate freight rates and charges similar to those authorized interstate by the Interstate Commerce Commission in *Increased Freight Rates,* 1951, 284 I. C. C. 589, commonly referred to as Ex Parte 175. The Mississippi Commission authorized the full increase sought on all less than carload freight and on all carload freight, except as to carload line haul rates of the commodities here involved.

Thereupon, the carriers filed their petition with the Interstate Commerce Commission under Section 13 (4), Part I, of the Interstate Commerce Act, and, pursuant thereto, the Interstate Commerce Commission entered into an investigation which culminated in the order which was set aside and permanently enjoined by the District Court. Both the Commission and the railroads which intervened in support of the Commission's order have appealed from the District Court's judgment.

The only specific assignment in the Jurisdictional Statement of the appellant railroad is, in effect, that the

District Court erred in holding the Commission's order to be unsupported by substantial evidence and that the court erroneously substituted its judgment for that of Commission on factual matters (Jurisdictional Statement of railroads, page 4). On the other hand, the Jurisdictional Statement of the Commission raises five specific questions, the first two of which deal with the question of whether the Commission's order was supported by substantial evidence and whether the court erroneously substituted its judgment for that of the Commission on factual questions (Commission's Jurisdictional Statement, page 3). The remaining three (Jurisdictional Statement, page 4) may be paraphrased as follows:

(a) Whether the District Court erred in holding the evidence legally insufficient because there was no segregation of interstate and intrastate operating statistics.

(b) Whether the District Court erred in holding that it was necessary that discrimination against interstate shippers be shown before the Commission could exercise its power under Section 13 (4).

(c) Whether the District Court erred in holding that the Commission committed an error of law in disregarding the evidence that passenger deficits were substantially lower in Mississippi than in the South generally or the nation as a whole.

We think it will become clear that the real issue in this cause is whether the Court below "misapprehended or grossly misapplied" the standard for a judicial determination of the substantiality of the evidence to support the Commission's order under the rules laid down in *Universal Camera Corp. v. National Labor Relations Board,* (1951), 340 U. S. 474. That this was the controlling

question in the case was clearly recognized by the District Court. It said:

> "The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission." 124 F. Supp., page 813.

The standard by which this question is to be determined has been fully, elaborately and exhaustively set forth by the Supreme Court in the *Universal Camera* case as recently as February 26, 1951. There appears to be no necessity at this time to review, restrict, alter, expand or elaborate upon the rule clearly and positively laid down in this case, and we believe that, regardless of any question which appellants may raise or endeavor to raise, directly or indirectly, this cause must be affirmed unless, in holding that the Commission's order was not supported by substantial evidence, the District Court "misapprehended or grossly misapplied" the principles enunciated in this case. We submit that the applicable law is clear and that the District Court neither misapprehended nor misapplied the standards fixed by *Universal Camera* and, therefore, that nothing substantial is presented in this case which needs or requires further argument.

We will discuss the questions raised by the Jurisdictional Statements in the order which we have stated them above.

I.

THE CONTENTION THAT THE DISTRICT COURT ERRONEOUSLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMMISSION ON FACTUAL QUESTIONS AND THE QUESTION OF WHETHER OR NOT THE COMMISSION'S ORDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

We submit that the opinion of the District Court clearly shows that it correctly and fully apprehended the rule and standards laid down in the *Universal Camera* case. This case makes it clear that the standard of judicial review under the Administrative Procedure Act is identical with the standard under the Taft-Hartley Act (see 340 U. S., pages 487, 490), and that this standard is far removed from one of judicial abdication or unquestioned rubber stamping of administrative findings. We quote selected portions of the *Universal Camera* opinion along with statements from the District Court's opinion so that this Court may compare one with the other and thus determine how scrupulously the District Court adhered to the standards set forth in the cited case.

In *Universal Camera,* the Court, in referring to the attitude of the sponsors of the Administrative Procedure Act, said:

> "On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing 'substantial evidence' test. But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practise of agencies to rely upon 'suspicion, surmise, implications, or plain incredible evidence,' and indicate that the

courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record.' " 340 U. S., pages 474, 475.

On page 487 of 340 U. S., there is the following statement:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

On page 488 of 340 U. S., the court went on to say:

"Congress has merely made it clear that a court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

From page 490 of 340 U. S.:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress

has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The opinion of the District Court makes it manifest that the court did not misapprehend these standards; on the contrary, the court specifically adhered to them. In its opinion (124 F. Supp., page 814), the District Court said:

"The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and *it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission* upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. *The Supreme Court of the United States in Universal Camera Corporation v. N. L. R. B.*, 340 *U. S.* 474, *held that in determining what is substantial evidence that the Court must take into*

consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission." (Emphasis added.)

And on page 815 of 124 F. Supp., the District Court said:

"The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but *it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order.*" (Emphasis added.)

We submit that the pronouncements of the District Court which are quoted above square perfectly with the standards laid down in *Universal Camera,* and, therefore, that it cannot successfully be argued that the District Court misapprehended the standard to be applied.

It is not our purpose here to review exhaustively the evidence and lack thereof which led the District Court to conclude that the Commission's order was not supported by substantial evidence. The opinion itself is its

own best expositor and it reveals that careful, deep, searching and conscientious analysis was given by the District Court to the record before it. The opinion itself refutes, we submit, the suggestion that the standards laid down in *Universal Camera* were grossly misapplied. There is no indication or suggestion in the opinion that the Court was seeking to modify or avoid any of the standards and tests laid down by the Supreme Court; the issue was purely and simply whether or not the Commission's order was supported by substantial evidence, and this issue was met by the District Court fairly and accurately. What the appellants here seek is that this Court should repeat a task already performed by the initial reviewing court—that of weighing the evidence to determine its substantiality. As to this, the *Universal Camera* opinion says:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U. S., pages 490, 491.

As stated, we do not attempt to restate the underlying evidence as it is carefully detailed in the Court's opinion. We do point out, however, that the issue involved was and is not limited to that stated by the Interstate Commerce Commission on page 16 of its Jurisdictional Statement, i. e., "ascertaining and determining whether the considered intrastate rates were causing discrimination against interstate commerce to the detriment of the national transportation system." That was only one of

the issues. For example, no one will argue that an increase in intrastate rates can be justified under Section 13 (4) if the end result is a decrease in revenue. This was one of the vital issues in this cause, as was the integral question of whether the Commission's finding on this point was supported by substantial evidence. On this question of the effect of an increase in intrastate rates upon intrastate revenues, there is no reason to believe that the Interstate Commerce Commission has any superior competence. On the contrary, there is every reason to believe that the Mississippi Commission is in the better position to make an authoritative determination. Just like the Interstate Commerce Commission on the national level, the Mississippi Commission has a continuing responsibility backed by an accumulated body of expert knowledge and, in addition, it has a special and favorable familiarity with local transportation conditions and problems. Combined with this is the fact that the Mississippi Commission actually listened to the testimony of witnesses upon the questions. The Mississippi Commission's order was a part of the record in this proceeding and, as such, it was quite appropriate for the District Court to consider it, just as the Supreme Court held in *Universal Camera* that the report of the Trial Examiner was a proper part of the record and entitled to consideration by the Court.

We make the foregoing observations also for the purpose of pointing out that, in *King v. United States,* 344 U. S. 254, it was said:

> "It is conceivable that some considerations properly given weight by the Commission in prescribing interstate freight rates in a general revenue proceedings might not be applicable equally to transportation within a particular State."

By this and other statements in the *King* case, the Court has recognized that a difference in local conditions within a given state are pertinent and proper considerations in Section 13 cases. We submit that the whole body of the testimony in this case establishes that the Commission not only was not supported by substantial evidence in its essential findings but that the Commission failed and refused to give any consideration to the difference in local conditions conclusively established by the overwhelming weight of the evidence.

We submit again that the appellants here seek to have this Court repeat a function already ably and correctly performed by the District Court—that of reviewing the evidence to determine its substantiality. Since the lower court, which has the "primary responsibility" (*National Labor Relations Board v. Pittsburg S. S. Co.*, 340 U. S. 498), has determined, after full consideration, that the essential findings are not supported by substantial evidence, there appear to be no special circumstances which would warrant a recanvassing of the record by a second reviewing court.

II.

THE OTHER ALLEGED ERRORS OF LAW COMMITTED BY THE DISTRICT COURT.

(a) *Whether the District Court erred in holding the evidence legally insufficient because there was no segregation of interstate and intrastate operating statistics.*

By this argument, appellants endeavor to give the impression that the District Court struck down the Commission's order because there was no separation by the railroads of their revenues, expenses and properties as

between interstate and intrastate operations. The District Court did *not* hold that "the evidence was legally insufficient" because it did not show such a separation. This feature was mentioned only once by the District Court and then only in a passing and discussatory fashion. On page 815 of 124 F. Supp., the Court said: "There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations." The correctness of this statement is beyond dispute. But nowhere in the Court's opinion is there any suggestion or inference that the Court held the evidence to be legally insufficient *because* of the absence of such a separation. The quoted statement was merely fair and legitimate comment and was not in any sense the reason advanced by the District Court for its ultimate holding that the Commission's order was not supported by substantial evidence. Thus this question falls of its own weight.

(b) *Whether the District Court erred in holding that it was necessary that discrimination against interstate shippers be shown before the Commission could exercise its power under Section* 13 (4).

This is another attempt to inject a question based upon a non-existent holding of the District Court. Nowhere in its opinion did the Court below base its conclusion and decision upon this question; in fact, the opinion clearly and specifically recognizes that the question of preference and shipper injury is not involved. Again we quote from the District Court's opinion:

"Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate com-

merce. *The Commission report of November* 2, 1953, *found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce.*" 124 F. Supp., page 813 (Emphasis added)

Thus we see that the Court below specifically recognized that the issue of preference and prejudice against persons and localities was not involved, and that the sole issue related to discrimination against interstate commerce. The statement relied upon by appellants was made by the Court below merely as a part of a general discussion of the power of the Commission under Section 13 (4), and it is difficult to understand how the appellants could interpret it as the basis or one of the bases of the Court's decision. This question likewise falls of its own weight, as it is totally unrelated to the District Court's decision.

(c) *Whether the District Court erred in holding that the Commission committed an error of law in disregarding the evidence that passenger deficits were substantially lower in Mississippi than in the South generally or the nation as a whole.*

In this connection, the Commission's Statement as to Jurisdiction states (page 4) that "This presents also the question whether the Commission actually did disregard the evidence as to passenger deficits." We submit that the Commission's report in the instant case makes it clear that the Commission did categorically reject the appellee's theory and contentions in this respect. In its report in the Section 13 proceedings here involved (291 I. C. C. 39, 63), the Commission said:

"The *novel theory of ratemaking* advanced by the Mississippi commission contemplates that the freight-

rate structure would vary according to variations in the passenger revenue by territories, areas, States, and possibly by individual lines of railroad. Some of the respondents operate no passenger service. *There is no sound basis for the contention that rate variations are justified because of such variations in passenger revenues.*" (Emphasis added.)

We think this makes it clear that the Commission ignored and dismissed all considerations of dissimilarities in passenger deficits in Mississippi as merely a "novel theory of ratemaking" and that it failed and refused to give consideration to the substantial evidence which clearly established different conditions which required a different treatment of Mississippi intrastate freight rates. Regardless, however, of what the Commission did or did not say, the evidence offered by the Mississippi Commission (taken from the carriers' official reports) was in the record and was not contradicted. Therefore, in reaching the conclusion it did the Commission necessarily disregarded it. There can be no other explanation. This evidence showed conclusively that the railroads' passenger deficits in Mississippi were substantially less than their deficits for their system-wide operations. These facts are shown by Exhibits 59, 60, 61, 62 and 63. For example, Exhibit 59 shows that the passenger operating ratio for the system operations of the carriers involved for 1951 was 134.71% while the passenger operating ratio for Mississippi was 123.27%, a difference of 11% in favor of Mississippi. Exhibit 61 shows that the Illinois Central Railroad in 1952 operated only 33.22% as many passenger car miles in Mississippi as it did in 1939, while for the system outside of Mississippi the corresponding percentage was 64.68%. This higher annulment of passenger

service in Mississippi necessarily resulted in a reduction of the passenger deficits.

The purpose of this and other testimony was to show that in Mississippi, since there was a smaller passenger deficit, there was a lesser basis for an increase in intrastate freight rates. This is but a logical extension of the doctrine laid down in *King v. United States,* 344 U. S. 254, where this Court upheld the Commission's contention that, in determining the reasonable level of freight rates to produce overall operating revenues, the Commission might take into consideration the deficits in passenger service operations. It appears to be the heighth of contradiction to urge, on the one hand, that the *fact* of a passenger deficit is to be considered but the *extent* of the deficit, whether one dollar or ten million, must be ignored. It follows logically, in our opinion, that, in balancing passenger deficits with freight revenue, additional returns from freight operations may be required only to the extent necessary to offset the passenger deficit and provide a fair aggregate return. If this be not correct, then it follows that freight rates are to be raised above a reasonable level where the passenger deficit is nonexistent or moderate.

We submit, therefore, that the Court below was correct in holding that the Commission erred in failing to give consideration to Mississippi's substantially lower passenger deficit, and that, in so holding, the District Court correctly interpreted *King v. United States.* In that case, however, the record disclosed that the passenger operating ratios of the three principal Florida railroads were approximately equal to that of the Southern Territory. In our case the record shows a substantially lower passenger operating ratio for Mississippi, and the inference is clear from the *King* case that dissimilarities in condi-

tions between States should be given due consideration as an important factor. Thus we say that, based on the *King* case, the District Court was correct in its conclusion that:

> "The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole." 124 F. Supp., page 817.

CONCLUSION

We again submit that regardless of any other question which the appellants may endeavor to raise the "paramount question" before the District Court was whether the Commission's order was supported by substantial evidence. If this question be determined adversely to appellants, this case should and must be affirmed, and the remaining questions injected fade into insignificance. We submit again that the District Court neither "misapprehended" nor "grossly misapplied" the standards laid down in the *Universal Camera* case and that there is no necessity for this Court to repeat the function of canvassing the evidence which has already been performed by the Court which, as stated in *National Labor Relations Board v. Pittsburg S. S. Co.* 340 U. S. 498, has the "primary responsibility" and which has determined, after full consideration, that the evidence before the Commission was not endowed with that degree of substantiality sufficient to support the Commission's order.

In the *Pittsburg Steamship* case the Circuit Court of Appeals had held that a Labor Board order was not supported by "substantial evidence on the record considered as a whole." The Supreme Court was asked to reverse this holding but the Court said:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way. *It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the order unsubstantiated.* In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543, 544." 340 U. S., page 503. (Emphasis added.)

We submit that this rule is equally applicable here and that, under it, the judgment of the District Court herein must be affirmed.

The Commission suggests (Jurisdictional Statement, pages 20-22) that, not only should the appeal be granted, but that the lower court should be reversed without argument on the basis of *King v. United States,* 344 U. S. 254, *Montana v. United States,* 117 F. Supp. 174, *Tennessee v. United States,* 113 F. Supp. 634, affd. 346 U. S. 891, reh. den. 346 U. S. 928, and *Louisiana v. United States,* 125 F. Supp. 180, affd. 348 U. S. 885, reh. den. Jan. 10, 1955. Not only do these cases fail to give to appellants the aid and comfort they seek but, in fact, they are substantially different from the instant case.

In these cases, the District Courts had in each instance found that the Commission's findings were supported by substantial evidence. The appellants in those cases, therefore, were asking the Supreme Court to recanvass the

evidence and to conclude that the lower courts were wrong. *This is just what the appellants are asking here.* On the other hand, we are saying that the decision of the District Court should be given exactly the same support that this Court gave the District Courts in the cited cases. In other words, the shoe is now on the other foot, and we take the same position here as the Commission did in the cited cases while the Commission's position is reversed. We say, just as the Commission did in the cited cases, that the conclusion of the District Court after its review of the entire record should not be disturbed. Therefore, these cases support our view rather than that of the appellants.

As to the Commission's reliance on the *Montana* case for a summary reversal here, we point out that the reversal there was dictated by completely different circumstances. The order of the Supreme Court in the *Montana* case shows that the case was reversed so that the District Court could apply the principles of the *King* case, which had recently been decided. Here there has been no intervening decision; the Court below was aware of the *King* case and of its obligation to follow its principles. Therefore, there is no basis for comparing the result in the *Montana* case with the situation now presented.

As to all of the cases mentioned, we make the observation that in each case the factual situation controls. Merely because the Commission's order was upheld in those cases does not mean that the order in this case must be upheld regardless of the evidence or anything else. This Court has never taken the position, either in *King* or any other case, that the fact that there was substantial evidence to support a Commission order in one case compels the conclusion that there is such evidence in all other cases. Each case must be controlled by its own facts, and

we do not agree that the factual situation here is identical with or substantially similar to the factual situation in the *Louisiana* case or the other cases relied on by appellants.

For all of the reasons discussed, we respectfully submit that the decision of the Court below is correct and that these appeals present no substantial question. Accordingly, the judgment of the District Court should be affirmed. Respectfully submitted,

J. P. Coleman, *Attorney General*

Dugas Shands, *Assistant Attorney General*

New Capitol, Jackson, Miss.

Counsel for Appellee, Mississippi Public Service Commission

Of Counsel:

James T. Kendall
Special Assistant Attorney General
Jackson, Mississippi

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 589

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

I. Contrary to the appellees' contentions, this appeal presents substantial questions of general public importance

Little or no argument should be necessary to prove that the questions presented in this appeal are substantial and of general public importance if it can be demonstrated, as we think it can, that the district court, in its decision to set aside and enjoin the Commission's order, misapprehended and grossly misapplied the standard pre-

scribed by this Court for determining the substantiality of evidence in a case such as this; or if it can be shown, as we believe it can, that the district court, in holding the evidence legally insufficient, grounded its decision upon clearly erroneous legal concepts as to the evidence which is required to sustain an order of the type here involved.

As set forth in detail in the Commission's Statement as to Jurisdiction, the Commission has found it necessary, since the end of World War II, to authorize several general increases in interstate freight rates to meet the railroads' increasing operating costs. A number of the state commissions have failed or refused to permit intrastate rates to bear their fair share of such costs, with the result that there have been numerous proceedings under Section 13 (4) of the Interstate Commerce Act in which the Commission, after hearings, has ordered increases in intrastate rates for the purpose of removing discrimination against interstate commerce.

Almost without exception during the past ten years, the Commission's orders thus increasing intrastate rates have been sustained by the courts when attacked. Among recent such cases are:

King v. *United States,* 344 U. S. 254;
Montana v. *United States,* 117 F. Supp. 174 (after remand, 344 U. S. 905);

Tennessee v. *United States,* 113 F. Supp. 634, aff'd., 346 U. S. 891, reh. den., 346 U. S. 928;

Louisiana v. *United States,* 125 F. Supp. 180, aff'd., 348 U. S. 885, reh. den., 348 U. S. 921;

North Carolina v. *United States,* — F. Supp. —, decided February 11, 1955.

Similar issues are necessarily involved in all these cases arising under Section 13 (4), including, in almost every instance, the question whether state refusal to permit increases in intrastate rates causes discrimination against interstate commerce. Obviously, all such Commission orders should be adjudged by the same standards of judicial review. If, as we contend, an entirely different standard was applied in this case, than that applied by the Supreme Court and by district courts in other such cases, the result would be grossly unfair to carriers and shippers alike, and the Commission would be placed under a much more difficult if not an impossible burden in carrying out its statutory duty to remove unjust discrimination against interstate commerce. If that is this case, as we insist it is, the questions presented are indeed substantial and generally important, and the judgment of the district court should not be permitted to stand.

II. It is clear from the opinion of the district court that it misapprehended and grossly misapplied the standard for determining the substantiality of the evidence. A review of the evidence by this Court is not required

In the motion to affirm, filed on behalf of the shipper appellees, it is asserted (p. 3) that the Commission and the railroad appellants "seek a re-review of the evidence" by this Court. The Mississippi Commission makes the same contention in its motion. Both are incorrect. It is unnecessary for this Court to review the evidence, for the district court's opinion shows clearly on its face that the court misapprehended and misapplied the standard of judicial review laid down by this Court in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

It is true that the district court *said* it was following the *Universal Camera* doctrine, but the question we raise on this appeal is whether it did in fact follow it, or did it misapprehend and misapply that doctrine when it held that the Commission's order was not supported by substantial evidence? The determination of that question does not require a reexamination of the evidence; it requires only that this Court consider and determine, from the district court's opinion, whether what that court did was proper under the law.

This Court stated in *Universal Camera* (at p. 488) that the requirement of the Administrative Procedure Act for a reviewing court to canvass the whole record in an administrative proceeding

was "not intended to negative the function of an [agency] presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." This Court has many times said that the Interstate Commerce Commission is such an agency, "appointed by law and informed by experience." *Illinois C. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 522.

In *Universal Camera* the Court also said that the requirement for canvassing the whole record does not "mean that as to matters not requiring expertise a court may displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S. 488.

It abundantly appears from the opinion of the district court that it did negative the Commission's function as the evidence-weighing and fact-finding body, with respect to the principal factual issues in the case, and that it did displace the Commission's choice "between two fairly conflicting views" as to the reasonableness of the considered intrastate rates and whether they were unjustly discriminatory against interstate commerce. Otherwise stated, the district court substituted its judgment for that of the Commission

on matters peculiarly within the province of the Commission to decide.

An example of the district court's misapplication of the prescribed standard and of its misconception of the function of a reviewing court is the following statement which appears in its opinion (at p. 809 of 124 F. Supp.):

> * * * In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. [Citation.] In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, *the court likewise must weigh such factors.* * * * [Emphasis added.]

Another instance of the court's exercise of the Commission's function of weighing the evidence is shown by the following excerpt from the opinion (124 F. Supp. 816):

> The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but *their testimony has been fully weighed* in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. * * * [Emphasis added.]

The testimony to which the court was referring was that of rate experts introduced by the railroads to the effect that the proposed increase in intrastate rates in Mississippi would produce additional revenue for the carriers of more than $550,000 per year. On the testimony of those experts, the Commission made a finding to that effect (finding No. 5, 291 I. C. C. 64). Yet the district court said of the evidence supporting the revenue finding (124 F. Supp. 816):

> * * * The testimony upon this proposition is exceedingly weak. * * * The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

We submit that the only conclusion properly to be drawn from the court's rejection of this evidence and of the Commission's finding thereon is that the court was under the misapprehension that its function was to try the case *de novo*, judge the weight to be given each portion of the evidence, and make its own appraisal of the facts, without regard to the findings already made by the Commission as the fact-finding body. In the *Jersey City* case, *supra*, this Court, speaking through Mr. Justice Jackson, said of the weight to be given the opinion of the Price Administrator as to the possibly inflationary effect of an

increase in fares ordered by the Commission (322 U. S. 522):

> * * * Who, then, in this case is to judge the weight to be given such a factor? The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitations on judicial review to be thrown overboard. *The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded some factors in relation to others.* [Emphasis added.]

The opinion of the district court also shows that it misapplied the prescribed rules of judicial review by basing its judgment on evidence not in the record before it, as opposed to the substantial record evidence upon which the Commission's findings were based. We refer to the court's repeated references to findings which it said had been made by the Mississippi Commission, but made, we emphasize, on evidence not in this record and not before either the Interstate Commerce Commission or the district court. These excerpts from the opinion are illustrative of the point we are making:

> * * * The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates

> that the Mississippi Commission gave great study and investigation and heard much testimony before the Commission itself and not through an examiner. * * *. (124 F. Supp. 814.)
>
> * * * The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings, detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. * * * (124 F. Supp. 815.)
>
> * * * The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways, and as a matter of fact in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, * * *. (124 F. Supp. 816.)

From these three excerpts it should be abundantly clear that the district court was quite willing to accept, and did accept and adopt, the Mississippi Commission's findings on factual questions in lieu of findings thereon by the Interstate Commerce Commission, even though the record before the court contained none of the evidence on which the state commission had made its findings but did contain all of the evidence

supporting the findings made by the Interstate Commerce Commission.

Considering all these indications of the district court's departure from the prescribed standard of judicial review, we feel warranted in saying that the court's decision should not be permitted to stand "unless all that has been established in administrative law concerning the limitation on judicial review [is] to be thrown overboard." *Jersey City* case, *supra.*

III. The district court's opinion shows that it based its decision on errors of law as to the type of evidence required to sustain a Section 13 order

In the Commission's Statement as to Jurisdiction, on pages 17–20, we pointed out and discussed three separate statements by the district court in its opinion which to us were and are erroneous as matters of law. The appellees, in their motions to affirm, without attempting to defend the legal correctness of two of the three statements we quoted, appear to take the position that those two statements were no part of the basis for the court's decision. A careful reading of the opinion will show, however, that these misconceptions of the law by the district court were largely responsible for its conclusion that the Commission's findings were not supported by substantial evidence.

Here is what the district court said as to the lack of evidence of segregation of rail operating

costs and revenues as between interstate and intrastate operations (124 F. Supp. 815):

> * * * *There must be a finding* based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. *There was no separation made by the railroads of their revenues, expenses and properties* as between interstate and intrastate operations. * * * [Emphasis added.]

If this statement by the court does not mean that it thought that evidence as to segregation of costs and revenues was essential to the support of a rate-increase order under Section 13 (4), we cannot understand why the court made the statement. It could hardly have indicated more clearly that the lack of such evidence was one of the reasons for holding that the total evidence was less than sufficient to support the order increasing the rates.

That no such evidence of cost and revenue segregation is required under the circumstances of this case is conclusively shown by the authorities cited on page 17 of the Commission's Statement as to Jurisdiction.

Another misconception of the law by the district court appears in its listing of numerous

factors which it considered necessary to sustain an order under Section 13 (4), as follows (124 F. Supp. 813):

> In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, *it must be shown,* among other things, * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *. [Emphasis added.]

If plain, unambiguous words mean what they say, this statement by the district court means that it considered as one of the prerequisites to the validity of the Commission's order that there be evidence of injury to interstate shippers as a result of the disparity between the interstate and the intrastate rates. Not any of the appellees contend, however, that any such evidence was legally necessary in this case, or that the court's statement was in any sense legally correct. It was obviously incorrect, and a false basis on which to set aside the Commission's order, for the reason that the order was grounded, not upon prejudice and preference to shippers, but upon discrimination against interstate commerce.

Except for referring to what we said in our Statement as to Judisdiction (pp. 18–20), we shall not lengthen this brief by again discussing the district court's holding with respect to evidence of passenger deficits. We understand that ques-

tion is being treated fully in the brief which the appellant railroads are filing in No. 588, and we agree with the argument there made.

CONCLUSION

For the reasons stated, we submit that the Court should deny the Motions to Affirm and should reverse the judgment of the district court.

Respectfully submitted.

EDWARD M. REIDY,
General Counsel,
LEO H. POU,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 588.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

FOREWORD.

Appellants' Statement as to Jurisdiction sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case, and a statement of the question presented, and contains references to the opinion of the District Court, the report of the Interstate Commerce Commission, and the applicable statutory provisions.

Motions to affirm the judgment of the District Court have been filed by the plaintiff below, Mississippi Public Service Commission, hereinafter called the Mississippi Commission, and by certain of the intervening plaintiffs, hereinafter called the shipper appellees. The Interstate

Commerce Commission is sometimes referred to hereinafter as the Commission.

It is appellants' position that the question raised by this appeal is substantial and of general public importance and merits full consideration by this Court and that the judgment of the District Court should be reversed.

SUMMARY OF ARGUMENT.

In this proceeding the Commission prescribed intrastate freight rates for the movement of certain important commodities within the State of Mississippi after finding that the intrastate rates required by the State authorities to be maintained on those commodities caused and would cause unjust discrimination against interstate commerce.

The District Court found no fault with the adequacy of the findings made by the Commission, which were substantially similar to those approved by this Court in *King* v. *United States* (1952), 344 U. S. 254. However, with one judge dissenting, the District Court set aside the order on the ground that it was not supported by substantial evidence.

The errors of the District Court which led it to misapprehend and misapply the proper standards for determining whether the order was supported by substantial evidence fall into two general categories: First, the District Court not only displaced the Commission's choice between two fairly conflicting views of the evidence but it also invaded the specialized field of knowledge of the Commission and substituted its judgment for that of the Commission on matters properly within the province of the Commission; second, the District Court committed certain errors of law as to what evidence was necessary to support the order under review and, in part, based its conclusion that the order was not supported by substantial evidence upon the lack of certain evidence which this Court has held is not necessary to support such an order.

In *Florida* v. *United States* (1934), 292 U. S. 1, 12, this Court ruled that the question of the weight of the evidence

was for the Commission and not for the courts. Had that rule been applied here, the order of the Commission would certainly have been upheld. An order of the Commission prescribing intrastate rates in Louisiana upon substantially similar evidence was upheld recently in *Louisiana Public Service Commission* v. *United States* (1954), 125 F. Supp. 180, affirmed by this Court in *Louisiana* v. *United States* (1954), 348 U. S. 885.

The opinion of the District Court evidences its belief that the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, conferred on it much greater latitude for weighing the evidence than this Court has previously permitted to courts reviewing orders of the Interstate Commerce Commission. It is appellants' position, however, that no such effect can be ascribed to *Universal Camera* and that that decision did not change the established rule of *Florida* v. *United States* (1934), 292 U. S. 1, 12, *supra,* that the question of the weight of the evidence is for the Commission and not for the courts.

In *Universal Camera,* this Court said that a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment wholly at large. This Court made it clear that a reviewing court cannot invade the function of the administrative agency within its specialized field of knowledge nor can it displace the agency's choice between two fairly conflicting views of the evidence even as to matters not within such a specialized field of knowledge.

We are not asking this Court to review the evidence to determine if the District Court was right or wrong. We are asking this Court, however, to rule that the District Court in fact displaced the Commission's choice between two fairly conflicting views of the evidence when it re-

ferred to the "testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests" as to the revenue effect of the increased rates and found such evidence not to be substantial. Likewise, we are asking this Court to hold that the District Court invaded the field of special competence of the Commission when it said it must weigh the effect of competition upon the fixing of reasonable rates. And when the District Court held that the Commission disregarded evidence of lower passenger deficits in Mississippi, in spite of the fact that the Commission had discussed this evidence and stated that it did not establish the claim of the Mississippi Commission, we submit that the District Court improperly invaded the province of the Commission both as to the weight of the evidence and matters within the specialized field of knowledge of the Commission.

We also ask this Court to rule that the District Court grossly misapplied the substantial evidence standard when two errors of law entered into its determination that the order was not supported by substantial evidence. This Court has held that the carriers are not required to attempt to separate property investment and expenses as between interstate and intrastate traffic. Yet the District Court assigned the lack of such separation as the principal reason for its conclusion that there was no substantial evidence to the effect that the Mississippi rates were abnormally low and that traffic thereunder failed to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The District Court also held that, for the exercise of the Commission's power under § 13(4) of the Act, it must be shown among other things that injury to interstate shippers has resulted, although it is well established by decisions of this Court that such injury is not one of the

elements essential to support an order based on a discrimination against interstate commerce.

These matters all concern the question whether the District Court applied the proper standards for determining whether the order of the Commission is supported by substantial evidence. Unless the District Court is to be the final and sole judge of its own power to determine the substantiality of evidence, the important questions raised by this appeal should have the considered judgment of this Court. While there may be a twilight zone between what is permissible in the way of judicial review and what is not, appellants submit that the District Court has so far exceeded the proper scope of judicial review in these several aspects that there can be no doubt that it has in fact misapprehended and grossly misapplied the standard of *Universal Camera* for determining the substantiality of evidence.

ARGUMENT.

I.

THE QUESTION PRESENTED BY THIS APPEAL IS OF GENERAL PUBLIC IMPORTANCE.

The question presented by this appeal and the subsidiary questions comprehended therein are important not only to the parties to this proceeding but also to the Interstate Commerce Commission in its administration of the Interstate Commerce Act, to the railroads generally, and to the shippers in all parts of the United States.

During the post-war period of increasing railway operating costs, the Interstate Commerce Commission has found it necessary to authorize several general increases in the interstate freight rates and charges of the railroads of the United States, the latest one being *Increased Freight Rates, 1951*, 284 I. C. C. 589, out of which this proceeding grew. Various state commissions, however, have refused to permit intrastate freight rates to be increased so as to bear their fair share of the increased operating costs of the carriers. This has resulted in numerous proceedings under §13(4) of the Interstate Commerce Act, 49 U. S. C. §13(4). In several of these proceedings, the Commission has found that the intrastate rates which the state authorities have required the carriers to maintain resulted in unjust discrimination against interstate commerce and has ordered such discrimination to be removed, as it did in this case.

Several such cases have been decided within the last three years and many others are pending at the present time. The orders entered by the Commission in two such

cases have recently been upheld in the courts. *Louisiana Public Service Commission* v. *United States,* 125 F. Supp. 180, affirmed in *Louisiana* v. *United States,* 348 U. S. 885; and *State of North Carolina* v. *United States,* ..... F. Supp. ....., (E. D. N. C.) decided February 11, 1955. In the latter case, notice of appeal to this Court has been filed.

It would seem evident that all orders entered by the Commission prescribing intrastate rates by virtue of the authority conferred on it by §13(4) of the Act to remove discrimination against interstate commerce should be adjudged on judicial review by substantially the same standards no matter in what court they are reviewed. The application by the District Court of an erroneous standard of judicial review is not only unfair to appellants here, but it is also unjust to interstate shippers and to intrastate shippers in other states who have to pay increased freight rates under substantially similar conditions.

Furthermore, if this Court approves the action of the District Court, it would be an invitation to all the reviewing courts to substitute their judgment for that of the Commission on the weight of the evidence, and the lack of uniform standards for determining the substantiality of evidence would make the Commission's administration of § 13(4) of the Act extremely difficult if indeed its power to prescribe intrastate rates would not be nullified completely.

II.

THE QUESTION PRESENTED BY THIS APPEAL IS SUBSTANTIAL.

A. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, Has Not Changed the Rule of Florida v. United States, 292 U. S. 1, That the Weight of the Evidence Is for the Commission and Not for the Courts.

In *Florida* v. *United States* (1934), 292 U. S. 1, 12, this Court stated as follows the rule which was to govern courts called upon to review judicially orders of the Commission entered under §13(4) of the Act:

> "The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by §13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra.* The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation

> to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission."

Had the District Court followed this rule as it has been followed by other courts through the years, the Commission's order would unquestionably have been sustained. However, the District Court's opinion makes it quite clear that that Court interpreted *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, as giving it considerably more latitude in the matter of weighing the evidence and drawing inferences and conclusions from the evidence. How this latitude was exercised will be shown later.

It is clear, however, from the decision of this Court in *Universal Camera* that no such drastic enlargement of the reviewing courts' power was intended by that decision holding that the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Thus, this Court said:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it

de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." 340 U. S. at 488.

How far a reviewing court may go in determining the substantiality of the evidence cannot be delimited with exactitude. As this Court recognized, no formula can be devised to avoid the process of judgment. But the Court also made it equally clear that a reviewing court's judgment is not left entirely at large, saying:

> "Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar 'substantial evidence' terminology indicates that no drastic reversal of attitude was intended.
>
> "But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in." 340 U. S. at 489.

It must also be borne in mind that the specific issue causing a reversal in *Universal Camera* concerned the effect to be given an examiner's report. This Court held that, apart from that issue, it could not be said that the Board's order was not sustained by substantial evidence considering the "record as a whole." 340 U. S. at 491-2.

Whether the District Court did exceed the proper scope of judicial review in the matters which will be discussed in the remaining sections of this brief certainly raises substantial legal questions on which this Court ought to pass, involving as they do a section of the Interstate Commerce Act under which there is a considerable amount of litigation.

The resolution of these questions does not require this Court to examine the record. The shipper appellees refer to the record in this proceeding as "voluminous" and "long and complex" (Motion to Affirm, pp. 3, 15) and the District Court said it had not overlooked the "testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests." 124 F. Supp. at 816; S. J. 25.* But whether the District Court is permitted to draw conclusions exactly opposite from those drawn by the Commission simply because there is a conflict in the evidence raises a legal question which needs no examination of the record for an answer.

Likewise, whether this Court will permit to go uncorrected errors of law which obviously contributed to the District Court's conclusion that the order was not supported by substantial evidence raises a substantial question which requires no reference to the evidence by this Court.

And certainly when the District Court holds (124 F. Supp. at 815; S. J. 25):

> "There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient."

which is directly contrary to the decision of this Court in *King* v. *United States* (1952), 344 U. S. 254, *supra*, that raises a question of law which does not require any extended reference to the record.

Indeed, there is nothing to indicate that the District Court itself gave the record more than a cursory inspection at the most. The transcript of the testimony before the Commission was 886 pages in length, and 126 exhibits

* S. J. indicates a reference to appellants' Statement as to Jurisdiction where the opinion of the District Court appears.

were introduced in evidence. It is appellants' contention that, when a reviewing court sets aside an order based on such a record on the ground that it is not supported by substantial evidence, the court has an obligation to discuss the evidence. That is especially true here where one judge dissented stating that, in his opinion, the order was supported by substantial evidence. A statement that it would "unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence" (124 F. Supp. at 816; S. J. 27) is not a substitute for an adequate discussion of what the evidence did show. Mere generalities do not show that a reviewing court has in fact conscientiously examined the record.

The shipper appellees suggest that the fact that this case was under advisement for four and one-half months and that "the Judge who wrote the opinion for the majority was the Judge who denied appellees' request for a temporary restraining order at the outset of the case" shows "a change of attitude which could result only from a study of the whole record." Motion to Affirm, p. 7. Aside from the obvious fallacy in this argument, appellees might also have mentioned that the same Judge at the close of the hearing on the merits announced that appellees' request for an interlocutory injunction had been denied and that less than twenty-four hours later the parties were informed that the Court had decided to grant an interlocutory injunction. If any inferences are to be drawn from these facts, it appears more likely that the case was decided without any inspection of the record.

B. The District Court Erred in Substituting Its Judgment for That of the Commission as to the Revenue Effect of the Increased Rates and the Effect of Competition on the Reasonableness of the Rates.

The District Court made several references to the effect that it must "weigh" the evidence. As pointed out in appellants' Statement as to Jurisdiction, this cannot be ascribed merely to an unfortunate choice of language but rather it clearly indicates the application of an erroneous standard of judicial review and one which is in no way sanctioned by *Universal Camera*. There can be no doubt that the District Court did "weigh" the testimony in violation of the rule of *Florida* v. *United States* (1934), 292 U. S. 1, *supra*. If that rule still governs the review of orders of the Commission under § 13(4) of the Act, the judgment of the District Court must necessarily be reversed.

On two issues particularly did the District Court depart far from its permitted scope of judicial review. One of these involved the effect of competition on the fixing of reasonable rates. On this point, the District Court said:

> "In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission* v. *Chicago Great Western Railway Co.*, C. C., 141 F. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors." 124 F. Supp. at 816; S. J. 26.

Clearly, the District Court was in error in undertaking to weigh the effect of competition on the reasonableness of the rates. Such a matter is clearly outside the permitted scope of judicial review. If there is anything within the

special competence of the Commission in a rate case, the effect of competition on the reasonableness of rates certainly must be. Having concluded, however, apparently on the supposed authority of *Universal Camera*, that it could disregard the evidence of the carriers and "weigh" the effect of competition on the reasonableness of the rates, the District Court then proceeded to find that the Mississippi Commission was in a better position to determine the effect of competition than was the Interstate Commerce Commission, a matter about which something more will be said later.

Another point on which the District Court departed far from the proper standard of review concerned the revenue effect of the increased rates ordered by the Commission. In addition to statistical evidence showing that in the past rate increases had resulted in increased revenue to the carriers, experienced traffic officials also testified that, based upon their knowledge of the situation, it was their opinion that substantial increased revenue would result from the rate increases. The District Court concluded, however, that this evidence was not substantial "when weighed in the light of the prevailing rule of law." 124 F. Supp. at 816; S. J. 26. The District Court then continued:

> "The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission." 124 F. Supp. at 816; S. J. 26-7.

Admittedly, some of the shippers testified that in their opinion the increased rates would not result in increased revenue for the carriers. This conflict in the evidence, however, was for the Commission to resolve, not for the District Court, and *Universal Camera* clearly so states. 340 U. S. at 488.

This Court has recognized that findings as to the future revenue effect of increased rates must necessarily rest upon predictions and has specifically approved findings based upon the type of evidence presented by appellants in this case. Thus, in *United States* v. *Louisiana* (1933), 290 U. S. 70, 80, this Court said:

> "It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute."

Also, in *Florida* v. *United States* (1934), 292 U. S. 1, 9, *supra,* this Court said:

> "The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satis-

factorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made."

The evidence of appellants as to revenue losses from the present rates and the revenue effect of the increased rates clearly met the essential requirements of the law as interpreted by this Court. For the District Court to substitute its judgment for that of the Commission was a gross error which should be corrected by this Court.

The recent decision of a specially constituted three-judge District Court upholding an order of the Commission prescribing intrastate rates in Louisiana not only illustrates the correct rule of judicial review for determining the substantiality of evidence but also shows the unfairness which results when in one state such an order of the Commission is upheld and in a neighboring state such an order is set aside simply because the two courts followed different rules for determining the substantiality of the evidence.

In *Louisiana Public Service Commission* v. *United States* (1954), 125 F. Supp. 180, 183, *supra,* the Louisiana District Court said:

> "We have considered the entire record, which comprises nearly one thousand pages of testimony and a great number of exhibits. In the belief that no useful purpose would be served by our reviewing the record here we shall not do so. It is sufficient to say that the Commission had before it a large volume of substantial evidence adduced by both sides of the controversy. In reaching its conclusions it was necessary for the Commission to weigh the evidence. That was a function which peculiarly addressed itself to the expertise of the Commission."

This decision was affirmed *per curiam* by this Court in *Louisiana* v. *United States* (1954), 348 U. S. 885, *supra.*

The record before the Commission in the present proceeding contained 886 pages of testimony and 126 exhibits. While no two cases are exactly alike, appellants do earnestly submit that this case and the *Louisiana* case involved substantially similar issues and that a fair reading of the reports of the Commission in the two cases, appearing at 291 I. C. C. 39 and 291 I. C. C. 279, will show that both orders were supported by substantially similar evidence. The same may be said for the decision of the Commission in *North Carolina Intrastate Freight Rates and Charges*, 293 I. C. C. 541, recently upheld in *State of North Carolina* v. *United States*, ... F. Supp. ..... (E. D. N. C.), *supra*, decided February 11, 1955. in which notice of appeal to this Court has been filed.

The shipper appellees' argument that the sand and gravel situation in Mississippi is different from that in Louisiana is no more reason for denying the Interstate Commerce Commission jurisdiction over Mississippi intrastate rates than the fact that there is a substantial movement of sugar cane in Louisiana and not in Mississippi would have been for denying the Commission jurisdiction over intrastate rates in Louisiana. Appellants submit that a fair analysis of the two cases will show that the difference in result was due not to any difference in conditions but to different standards of judicial review being applied in the two cases.

C. It Is Evident That the District Court's Errors of Law With Respect to Separation of Interstate and Intrastate Expenses and Property Investment and Lack of Injury to Interstate Shippers Were Important Factors in Its Conclusion That the Commission's Order Was Not Supported by Substantial Evidence.

Appellees argue that the errors of law made by the District Court should be ignored because such errors were not "holdings," that such errors were "peripheral rather than basic," and that such errors were not advanced by the District Court as reasons for its ultimate holding. Mississippi Commission's Motion to Affirm, pp. 11-13; shipper appellees' Motion to Affirm, pp. 12-14.

In dealing with the separation of interstate and intrastate expenses and property investment, the District Court said:

> "There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers." 124 F. Supp. at 815; S. J. 24.

Clearly, this shows that the District Court's conclusion that the order was not based on substantial evidence was founded to a considerable extent on the District Court's belief that there should have been such a separation.

The District Court's finding that appellants did not separate revenues as between interstate and intrastate traffic is in error. Appellants did make such a separation of revenues (Ex. 1, sheet 3). But for obvious reasons, the separation of expenses and property investment between interstate and intrastate traffic where such traffic is handled in the same trains, through the same stations and by the same personnel is quite a different matter from the separations of revenues between interstate and intrastate traffic. The Commission, the expert body having knowledge of such matters, has held that separation of investment in properties and expenses of handling traffic as between interstate traffic on the one hand and intrastate traffic on the other hand is impracticable and is not required. *Wyoming Intrastate Freight Rates and Charges* (1953), 287 I. C. C. 743, 755; *North Carolina Intrastate Freight Rates and Charges* (1954), 293 I. C. C. 541, 557, *supra*. Its order in the latter case was, as previously stated, upheld in *State of North Carolina* v. *United States*, ... F. Supp. ....., (E. D. N. C.), *supra*, decided February 11, 1955, where again this issue was dealt with, and it was ruled that the position of the Commission was sound.

This Court has specifically held that no such separation is required. In *Illinois Commerce Commission* v. *United States* (1934), 292 U. S. 474, 483-4, this Court said:

> "Specific objections to the sufficiency of the findings * * * are that * * * there was no finding which separated interstate and intrastate property, revenues and expenses of the carriers so as to make it possible to compare revenues with cost for the two classes of traffic considered separately. * * * Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately

> bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

The correct rule as stated by this Court on numerous occasions is that the power of the Commission to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return "on the value of property devoted to the transportation service, both interstate and intrastate." *United States* v. *Louisiana* (1933), 290 U. S. 70, 75 *supra; North Carolina* v. *United States* (1945), 325 U. S. 507, 520.

In spite of the decisions of this Court and lower courts to the contrary, the Mississippi Commission argued in the District Court that, since no separation of property and expenses had been made, there was nothing to show that the carriers were not making a reasonable return from their intrastate rates. At page 10 of its brief in the District Court, the Mississippi Commission said:

> "In the first place, we point out that in the proceedings before the Commission, the railroads involved made no separation of their revenues, expenses and properties as between interstate and intrastate operations. There is nothing in the record, therefore, by which it can be determined whether the railroads' intrastate operations were already affording a fair and reasonable return. The record is entirely silent, so far as the railroads' evidence is concerned, upon the important question of whether or not the carriers' operations under the superseded rates were already affording and yielding adequate revenue."

Masonite Corporation and The Flintkote Company also took the same position in their brief. It is strange that these parties should now say that the District Court did not rely on this argument which they so strongly urged

upon it. Clearly, the contrary is true. The District Court did adopt this argument and gave it as one of the prominent reasons for its conclusion that the Commission's order was not supported by substantial evidence.

Another error of law was made by the District Court in stating the essential requirements for the validity of an order under §13(4) of the Act. The District Court said:

> "In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13(4) of the Act, it must be shown, among other things * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *" 124 F. Supp. at 813; S. J. 20.

Appellees' argument that this is not a "holding" is so lacking in merit as to require no refutation.

The distinction between orders based upon unjust discrimination against interstate commerce and those based upon undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other not only clearly appears in §13(4) of the Act itself but was spelled out by this Court in *Florida* v. *United States* (1931), 282 U. S. 194, 214, and was called to the attention of the District Court in the brief of appellants. If the District Court had understood this distinction, it surely would not have held that injury to interstate shippers was a necessary requirement for orders based on discrimination against interstate commerce.

This holding of the District Court, listing what it conceived to be the essential requirements for upholding the validity of any order entered under § 13(4) of the Act, appears to have been adopted word for word from page 4 of the Mississippi Commission's brief before the District Court. It can hardly have been an inadvertence, as argued

by the shipper appellees (Motion to Affirm, p. 14), and there is every reason to believe that the District Court's conclusion that the order was not supported by substantial evidence was based in part on its erroneous concept of what was necessary to support the validity of such an order.

What may be regarded as the ultimate finding of the District Court was:

> "The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined." 124 F. Supp. at 815; S. J. 23.

In the light of this finding, it is impossible to conclude that the District Court did not put any reliance on these errors of law in concluding that the order was not supported by substantial evidence. The District Court's opinion shows that the contrary is true. Even if the District Court had made no other errors, these alone would warrant reversal of its judgment.

D. The District Court Erred in Holding That Findings of the Mississippi Commission Made in Another Proceeding Involving Dissimilar Issues Upon Evidence Not a Part of This Record Detracted from the Findings of the Interstate Commerce Commission.

The District Court seemed to think that one of the principal questions in this case was whether the Interstate Commerce Commission or the Mississippi Commission is best able to regulate intrastate rates in Mississippi, a matter which is wholly foreign to the issue of whether the intrastate rates cause discrimination against interstate commerce.

The District Court referred to the study and investigation given the matter by the Mississippi Commission and the fact that the Mississippi Commission had heard the evidence itself and not through an examiner while the Interstate Commerce Commission had heard the evidence through an examiner. It also concluded that the Mississippi Commission was in a better position than the Interstate Commerce Commission to determine the effect of competition upon the carriers. 124 F. Supp. at 814, 816; S. J. 22, 26.

True, it paid lip service to the correct rule of judicial review, that findings of the Interstate Commerce Commission must be upheld if supported by substantial evidence, but its opinion shows that, in concluding that the order was not supported by substantial evidence, it gave weight to matters which are entitled to no weight in this proceeding. Thus, the District Court said:

> "Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner." 124 F. Supp. 815-16; S. J. 25.

This, in effect, erroneously requires the Interstate Commerce Commission to overcome a presumption against the validity of its order.

The argument of the Mississippi Commission that its findings may be considered in the same light as those of a trial examiner (Motion to Affirm, p. 10) is, we believe, sufficiently lacking in merit as to require no discussion. The substantiality of the evidence to support the Commis-

sion's order must be determined on the evidence before the Commission. The fact that the orders of the Mississippi Commission were attached as exhibits to the petitions of the carriers seeking relief from the Interstate Commerce Commission does not entitle such orders to evidentiary weight as to the reasonableness of the rates or similar matters. For the District Court to give them such weight was erroneous as was also the weight it apparently gave to its belief that the Mississippi Commission was better able to regulate intrastate rates than the Interstate Commerce Commission. For these errors, too, its judgment must be reversed.

E. The District Court Erred in Holding That the Commission Disregarded Evidence of Lower Passenger Deficits in Mississippi.

It is impossible to tell from its opinion just what the District Court did hold or intend to hold with respect to the passenger deficit question. This is what the Court said:

> "The Interstate Commerce Commission in *Ex Parte* No. 175, when granting freight rate increases took into consideration the losses sustained by the railroads in passenger operations. This was correct and was upheld in *King* v. *United States,* 344 U. S. 254, 73 S. Ct. 259, 97 L. Ed. 301, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi.
>
> • • • • •
>
> "The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than passenger deficits of the same railroads for their

> systemwide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Commission to give proper consideration to this testimony. *King* v. *United States, supra.*" 124 F. Supp. at 815, 817; S. J. 24-5, 28.

In one breath the District Court speaks of lower passenger deficits in Mississippi as an established fact and in the next says that "if the passenger deficit in Mississippi was less than that of the nation as a whole," it was the duty of the Commission to give consideration to that fact. Obviously, these are quite different things.

Certainly, the District Court did not intend to hold as a matter of law that the Commission must determine passenger deficits by States. That is not required under *King* v. *United States* (1952), 344 U. S. 254, *supra,* and it would be unthinkable that such a rule could be imposed on the Commission by a District Court and without full consideration by this Court of the results of such a holding. The District Court obviously gave no such consideration to the problem. There are many ramifications to the question. For one thing, if expenses and property investment cannot practicably be separated as between those applicable to interstate traffic and those applicable to intrastate traffic, why is there any reason to require an arbitrary separation of passenger operations by States which would be no more reliable?

Although the Interstate Commerce Commission has a formula for separating the results of freight and passenger operations, there is no such formula for separating freight and passenger operations within a State. On other occa-

sions, the Commission has noted the general unreliability of operating results subdivided as to States. In *Western Trunk Line Class Rates* (1930), 164 I. C. C. 1, 62-63, the Commission considered in detail the problems incident to the separation of operating results by States and concluded:

> "Without reviewing here all the defects and infirmities claimed in the formulas for allocating revenues, expenses, and other items to States, the foregoing will suffice to cast doubt upon the reliability of operating results subdivided as to States."

See also *Minnesota Intrastate Rates and Charges* (1953), 288 I. C. C. 149, 157, where a similar contention was discussed in a proceeding arising under §13(4) of the Act.

Furthermore, it is apparent that there was no reliable factual basis for the claim of the Mississippi Commission that passenger deficits were lower in Mississippi than in other parts of the Nation. Aside from the general unreliablity of an attempted segregation of operating results by States, there are a few other brief comments which should be made concerning this evidence of the Mississippi Commission. The Mississippi Commission says that its evidence on this point "was not contradicted" (Motion to Affirm, p. 14), which is certainly not the case.

In the first place, when the Mississippi Commission speaks about passenger deficits in Mississippi, it is not referring to Mississippi intrastate passenger operations; rather, it is referring to its attempt to develop results for Mississippi passenger operations including both intrastate and interstate operations within the State of Mississippi (Tr. 433). No attempt was ever made to develop results for Mississippi intrastate passenger operations. Under such circumstances, how could there be any possible legal basis for treating the intrastate shipper of freight any

different from the shipper who ships to, from or through Mississippi in interstate commerce?

Furthermore, as shown by the cross-examination of the witness for the Mississippi Commission (Tr. 830, 836-9) and by appellants' rebuttal testimony (Tr. 869-72), the testimony and exhibits of the Mississippi Commission were so full of errors as to be completely unreliable. The Commission was justified in not accepting such evidence as showing lower passenger deficits in Mississippi.

What did the District Court mean by saying the Commission must consider this evidence? Obviously, the Commission did consider it. In its report, 291 I. C. C. at 63, it said:

> "The Mississippi commission presented data designed to show that the discontinuance of several passenger trains in Mississippi and the furnishing of relatively less day-train service in that State than on other portions of the respondents' lines have resulted in proportionately smaller deficits in passenger revenue in that State. It argues that those changes have effected relatively greater economies in the respondents' intrastate operations than on other portions of their lines, requiring proportionately smaller contributions by the intrastate freight revenue to cover passenger-revenue deficits in Mississippi, which should be reflected in the level of the intrastate freight rates in relation to the interstate rates.
>
> "The respondents' passenger-service operations have shown deficits in each of the years 1940 through 1951, except for 1943 through 1945. They have become progressively larger each year, aggregating $60,249,439 in 1951. The passenger-train eliminations in recent years have affected all portions of their system lines. There is no indication that the economies effected in Mississippi were relatively greater than on other portions of their lines. The novel theory of rate-making advanced by the Mississippi commission contemplates that the freight-rate structure would vary according to variations in the passenger revenue by

territories, areas, States, and possibly by individual lines of railroad. Some of the respondents operate no passenger service. There is no sound basis for the contention that rate variations are justified because of such variations in passenger revenues."

There is nothing in the District Court's opinion to indicate that it was aware of this discussion by the Commission, although it was called to its attention in appellants' brief.

Since the Commission did consider this evidence, it is not for the District Court to substitute its judgment for that of the Commission on the weight of the evidence. The Commission was entirely correct in holding that the evidence did not establish that passenger-train eliminations resulted in lower passenger deficits in Mississippi than elsewhere on appellants' systems, as claimed by the Mississippi Commission. The Commission's holding on this point is supported by substantial evidence and the District Court, in invading the province of the Commission and substituting its judgment for that of the Commission, again misapprehended and grossly misapplied the standard of *Universal Camera*.

CONCLUSION.

The findings made by the Interstate Commerce Commission are substantially the same as those approved by this Court in *King* v. *United States* (1952), 344 U. S. 254, *supra*, and *Louisiana* v. *United States* (1954), 348 U. S. 885, *supra*. Those findings are, we submit, supported by substantial evidence.

It is evident that the majority of the District Court misapprehended and grossly misapplied the standard for determining the substantiality of the evidence set forth by this Court in a long line of cases and particularly in

Florida v. *United States* (1934), 292 U. S. 1, *supra*, and *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, *supra*.

Appellants submit that the question presented by this appeal is substantial and of general public importance and merits full consideration by this Court and that the judgment of the District Court should be reversed.

Respectfully submitted.

HAROLD E. SPENCER,
135 East Eleventh Place,
Chicago 5, Illinois,
A. J. BAUMANN,
Frisco Building,
St. Louis 1, Missouri,
ROBERT BURNS,
P. O. Box 330,
Jackson, Mississippi,
J. L. BYRD,
1007 Deposit Guaranty Bank Bldg.,
Jackson, Mississippi,
A. J. DIXON,
P. O. Box 1808,
Washington 13, D. C.,
Y. D. LOTT, JR.,
104 St. Francis Street,
Mobile 5, Alabama,
PRIME F. OSBORN,
908 West Broadway,
Louisville, Kentucky,
Counsel for Appellants.

J. H. WRIGHT,
135 East Eleventh Place,
Chicago 5, Illinois,
Of Counsel.

affirm are granted and the judgment is affirmed. MR. JUSTICE REED dissents. *Harold E. Spencer, A. J. Baumann, Robert Burns, J. L. Byrd, A. J. Dixon, Y. D. Lott, Jr.* and *Prime F. Osborn* for appellants in No. 588. *Edward M. Reidy* and *Leo H. Pou* for appellant in No. 589. *J. P. Coleman,* Attorney General of Mississippi, and *Dugas Shands,* Assistant Attorney General, for the Mississippi Public Service Commission; and *Jim C. Floyd* and *Charles A. Horsky* for the American Sand & Gravel Co. et al., appellees. Reported below: 124 F. Supp. 809.

No. 588. ILLINOIS CENTRAL RAILROAD CO. ET AL. *v.* MISSISSIPPI PUBLIC SERVICE COMMISSION ET AL.; and

No. 589. INTERSTATE COMMERCE COMMISSION *v.* MISSISSIPPI PUBLIC SERVICE COMMISSION ET AL. Appeals from the United States District Court for the Southern District of Mississippi. *Per Curiam:* The motions to